No. 88-7629-CSY
Status: DECIDED
CAPITAL CASE

Title: Robert Wayne Vickers, Petitioner
v.
Arizona

Docketed:
June 20, 1989

Court: Supreme Court of Arizona

Counsel for petitioner: Young,Denise I.

Counsel for respondent: Roberts,Jack

Entry	Date	Note	Proceedings and Orders
1	May 12 1989	G	Application (A88-900) to extend the time to file a petition for a writ of certiorari from May 21, 1989 to June 20, 1989, submitted to Justice O'Connor.
2	May 17 1989		Application (A88-900) granted by Justice O'Connor extending the time to file until June 20, 1989.
3	Jun 20 1989	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
5	Jul 18 1989		Brief of respondent Arizona in opposition filed.
6	Jul 27 1989		DISTRIBUTED. September 25, 1989
7	Jun 1 1990		REDISTRIBUTED. June 7, 1990
8	Jun 22 1990		REDISTRIBUTED. June 27, 1990
10	Jun 28 1990		The petition for a writ of certiorari is denied. Dissenting opinion by Justice Brennan with whom Justice Marshall joins. (Detached opinion.)

****

No. 88-7629

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT WAYNE VICKERS

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

Supreme Court, U.S.
FILED
JUN 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF ARIZONA

Denise I. Young
Arizona Capital
Representation Project
Arizona State University
College of Law
Tempe, Arizona 85287-0604
(602) 965-8185

Attorneys for Petitioner

RECEIVED
JUN 24 1989
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the state court's denial of petitioner's request for basic diagnostic medical tests recommended by seven mental health experts and essential to substantiate his only defense at trial violated due process of the law.

2. Whether Arizona's death penalty statute violates the Sixth Amendment by denying a jury trial on the factual elements of capital murder specified by state law.

3. Whether Arizona's capital sentencing statute violates the Eighth and Fourteenth Amendments by:

a) requiring that death be imposed if the defendant fails to prove the existence of mitigating circumstances sufficiently substantial to call for leniency; and

b) precluding the sentence from considering mitigating circumstances unless the defendant has established their existence by a preponderance of the evidence.

4. Whether Arizona's "especially heinous, cruel or depraved" aggravating circumstance, as interpreted and applied by the Arizona courts, fails to channel the sentencer's discretion as required by the Eighth Amendment.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 5

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW . 9

REASONS FOR GRANTING THE WRIT 10

I. Petitioner's right to a fair trial was violated when he was deprived of diagnostic testing that seven medical experts concluded was essential to his substantial insanity defense 10

II. The decision below directly conflicts with the decision of the Ninth Circuit which held that Arizona's death penalty statute violates the Sixth Amendment by removing the jury from the determination of the elements of the distinct offense of capital murder 13

III. The decision below directly conflicts with the decision of the Ninth Circuit which held that Arizona's death penalty statute violated the Eighth and Fourteenth Amendments by precluding the sentencer from considering all relevant mitigating circumstances and presuming death to be the appropriate sentence 15

IV. The decision of the court below is irreconcilable with this Court's decision in Maynard v. Cartwright and the Ninth Circuit's decision in Adamson v. Ricketts 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases	Page
Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988). .	passim
Ake v. Oklahoma, 470 U.S. 68 (1985)	passim
Blake v. Kemp, 758 F.2d 523 (11th Cir.), cert. denied, 474 U.S. 998 (1985)	11
Blystone v. Pennsylvania, cert. granted, ___ U.S. ___, No. 88-6222 (1989)	18
California v.Ramos, 463 U.S. 992 (1983)	14
Eddings v. Oklahoma, 455 U.S. 104 (1982)	15, 17
Fitzpatrick v. State, 638 P.2d 1002 (Mont. 1981) . .	15
Godfrey v. Georgia, 446 U.S. 420 (1980)	18
Harper v. Grammer, 654 F.Supp. 515 (D.Neb. 1987) . .	15
Hays v. Murphy, 663 F.2d 1004 (10th Cir. 1981). . . .	10, 13
Hildwin v. Florida, ___ U.S. ___ (1989)	14
Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988) . .	17
Lockett v. Ohio, 438 U.S. 586 (1978)	15, 17
Mason v. Arizona, 504 F.2d 1345 (9th Cir. 1974), cert. denied, 420 U.S. 936 (1975)	11
Maynard v. Cartwright, 108 S.Ct. 1853 (1988)	18, 19
Ricketts v. Adamson, petition for cert. filed, ___ U.S. ___ (Mar. 20, 1989)	15
Roberts v. Louisiana, 428 U.S. 325 (1976)	15
Spaziano v. Florida, 468 U.S. 447 (1984)	14
State v. Creech, 670 P.2d 463 (Id. 1983), cert. denied, 465 U.S. 1051 (1984)	15
State v. Gretzler, 659 P.2d (Ariz.), cert. denied, 461 U.S. 971 (1983)	17, 18
State v. Jordan, 614 P2.d 825 (Ariz. 1980).	14
State v. McMurtrey, 691 P.2d 1099 (Ariz. 1984). . . .	15
State v. Ortiz, 639 P.2d 1020 (Ariz. 1981), cert. denied, 456 U.S. 984 (1982)	19
State v. Sireci, 536 So.2d 231 (Fla. 1988).	11
State v. Quinn, 623 P.2d 644 (Ore. 1981)	15
State v. Vickers, 768 P.2d 1177 (1989)	1, 10
State v. Zaragoza, 639 P.2d 22 (Ariz.), cert. denied, 468 U.S. 1124 (1983)	17
United States v. Chavis, 486 F.2d 1290 (D.C. 1973). .	10
United States v. Crews, 781 F.2d 826 (10th Cir. 1986)	13

Cases	Page
United States v. Flynt, 756 F.2d 1352 (9th Cir. 1985)	12
United States v. Hartfield, 513 F.2d 254 (9th Cir. 1975)	12, 13
United States v. Pope, 841 F.2d 954 (9th Cir. 1988) .	11
United States v. Taylor, 437 F.2d 371 (4th Cir. 1971)	10
United States v. Sloan, 776 F.2d 926 (10th Cir. 1985)	13
United States v. Walker, 537 F.2d 1192 (4th Cir. 1976)	10
Walton v. Arizona, petition for cert. filed, ___ U.S. ___(May 19, 1989)	15
Woodson v. North Carolina, 428 U.S. 280 (1976) . . .	15
Woratzeck v. Ricketts, 108 S.Ct. 2815 (1988)	19

Constitutional Provisions

U.S. Const. Amend. V	passim
U.S. Const. Amend. VI	passim
U.S. Const. Amend VIII	passim
U.S. Const. Amend. XIV	passim

Statutory Provisions

A.R.S. 13-703	passim

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT WAYNE VICKERS

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF ARIZONA

The Petitioner, Robert Wayne Vickers, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arizona entered on January 30, 1989.

OPINION BELOW

The opinion of the Arizona Supreme Court, State v. Vickers, is reported at 768 P.2d 1177 (1989).

JURISDICTION

The judgment of the Supreme Court of Arizona affirming Petitioner's conviction was entered on January 30, 1989. A timely motion for reconsideration was filed and denied by order of the Arizona Supreme Court on March 21, 1989. The order denying

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257 (3)(1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V: No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. VI: In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed. . .

U.S. Const. amend. VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV: No state shall . . . deprive any person of live, liberty, or property, without due process of law. . .

A.R.S. Section 13-703:

Sentence of death or life imprisonment without possibility of release until the defendant has served a prescribed period of time; aggravating and mitigating circumstances

A. A person guilty of first degree murder as defined in § 13-1105 shall suffer death or imprisonment in the custody of the state department of corrections for life, without possibility of release on any basis until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five years if the victim was under fifteen years of age, as determined and in accordance with the procedures provided in subsections B through G of this section.

B. When a defendant is found guilty of or pleads guilty to first degree murder as defined in section 13-1105, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge in the event of the death, resignation, incapacity or disqualification of the judge who presided at the trial or before whom the guilty plea was entered, shall conduct a separate sentencing hearing to determine the existence or non-existence of the circumstances included in subsection F and G of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

C. In the sentencing hearing the court shall

disclose to the defendant or defendant's counsel all material contained in any presentence report, if one has been prepared, except such materials as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or non-existence of the circumstances included in subsection F or G of this section. Any information relevant to any mitigating circumstances included in subsection G of this section may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F and G of this section. The burden of establishing the existence of any of the circumstances set forth in subsection F of this section is on the prosecution. The burden of establishing the existence of the circumstances included in subsection G of this section is on the defendant.

D. The court shall return a special verdict setting forth its findings as to the existence or non-existence of each of the circumstances set forth in subsection F of this section and as to the existence of any of the circumstances included in subsection G of this section.

E. In determining whether to impose a sentence of death or life imprisonment without possibility of release on any basis until the defendant has served twenty-five calendar years if the victim was fifteen or more years of age or thirty-five calendar years if the victim was under fifteen years of age, the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

F. Aggravating circumstances to be

considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

7. The defendant committed the offense while in the custody of the state department of corrections, a law enforcement agency or county or city jail.

8. The defendant has been convicted of one or more other homicides, as defined in section 13-1101, which were committed during the commission of the offense.

9. The defendant was an adult at the time the offense was committed or was tried as an adult and the victim was under fifteen years of age.

10. The murdered individual was an on duty peach officer who was killed in the course of performing his official duties and the defendant knew, or should have known, that the victim was a peace officer.

G. Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the

defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under the provision of section 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

5. The defendant's age.

STATEMENT OF THE CASE

Petitioner was convicted and sentenced to death for the murder of a prison inmate. Petitioner's only defense at trial was insanity. Petitioner's medical records indicated that he had temporal lobe epilepsy, an organic brain disorder which can cause violent behavior and impair the victim's ability to understand the nature of his acts. Based on these records, Petitioner timely requested appointment of a mental health expert to examine him. The trial court granted that request and, pursuant to Rule 11, Ariz. R. Crim. P., appointed Dr. Paul Bindelglas on behalf of the defense and Dr. Maier I. Tuchler on behalf of the State to determine Petitioner's competency to stand trial and his mental status at the time of the offense.

After an exhaustive review of Petitioner's medical and legal records and social history and a three hour interview of Petitioner, Dr. Bindelglas opined that Petitioner has "definite

dissociative reactions" due "to either complex partial seizures from the temporal lobe, a multiple personality . . ., or both." March 12, 1985 Report to the Honorable James E. Don, attached as Appendix "B". Dr. Bindelglas based those conclusions, in part, on Petitioner's history of cerebral trauma, seizures, bizarre and violent behavior, an abnormal electroencephalogram ("EEG") performed in 1978 indicating epilepsy, improvement in Petitioner's behavior when he was placed on anti-convulsive and psychotropic medication and a recurrence of symptoms when his medication was terminated. Dr. Bindelglas opined that it was likely that Petitioner was in a dissociative state when he committed the offense which made him incapable of rendering judgment and "unable to know right from wrong." However, Dr. Bindelglas stated that he could not make a definite diagnosis without neuropsychological testing, including a EEG taken during sleep.

Based upon Dr. Bindelglas's observations and recommendations, Petitioner requested diagnostic testing and as further support, attached the affidavit of Dr. David M. Bear, a Boston psychiatrist who specialized in neurology and, particularly, temporal lobe epilepsy. See Appendix "C". Dr. Bear reviewed Petitioner's records, social history and conducted a five hour exam of Petitioner in an unrelated case. Dr. Bear agreed that there was a significant likelihood that Petitioner suffered from temporal lobe epilepsy which may have substantially impaired his "ability to know the nature and quality of the acts committed and/or ability to appreciate the wrongfulness of the act." Dr. Bear, too, recommended diagnostic testing and evaluation so that a definite diagnosis could be made.

Without ruling on Petitioner's request for diagnostic testing, the court held a hearing to determine Petitioner's competency to stand trial. At the hearing, the state's expert, Dr. Tuchler, who had earlier concluded that Petitioner did not suffer from temporal

lobe disorder and was competent to stand trial, changed his opinion. He testified that the 1978 EEG showed "temporal lobe abnormality" and that he was no longer certain that Petitioner did not suffer a mental disorder. Dr. Tuchler agreed with Dr. Bindelglas that diagnostic tests were necessary, including a "electronasopharyngial and multiple electroencephalograms [and] [i]f necessary, two or three days of sleep electroencephalograms . . . ."

Following the hearing, Petitioner supplemented his motion for further testing with the affidavits of two more psychiatrists, Dr. Michael Nelson who specialized in brain-behavior interaction and Dr. Jose M. Santiago who specialized in gross psychopathology. See Appendices "D" and "E". Although neither Dr. Nelson nor Dr. Santiago had personally examined Petitioner, they reviewed Petitioner's records and previous psychiatric evaluations. Dr. Nelson found "significant evidence . . . of a temporal lobe disorder . . . that affects his thinking, feeling and behavior," and that there is "strong reason to suspect a syndrome of episodic discontrol, produced by even relatively trivial emotional stress. . . ." Dr. Santiago stated that Petitioner's history of temporal lobe epilepsy could severely impair his ability to think clearly. Both psychiatrists recommended neurological and psychological examinations.

Despite the unanimous opinion of the court-appointed psychiatrists recommending specific diagnostic tests, the court denied Petitioner's request for those tests and instead appointed, at the state's request, Dr. William Masland "to test said defendant for temporal lobe epilepsy."

Dr. Masland did not do as the court ordered. He did not test Petitioner for temporal lobe epilepsy and he conducted none of the tests recommended by Drs. Bindelglas, Bear, Nelson, Santiago and the state's own expert, Tuchler. Instead after a cursory review

of some of Petitioner's medical records, conversations with the prosecutor and prison staff, and a fifteen minute interview of Petitioner, Dr. Masland concluded in a two paragraph letter that "[h]istorically, there is absolutely nothing to suggest that this man is epileptic," and that "further diagnostic testing, such as electroencephalography, would be totally superfluous." See Appendix "F". Based upon that report and despite its earlier order requiring Dr. Masland to test Petitioner for temporal lobe epilepsy, the trial court denied Petitioner's request for further diagnostic testing.

Petitioner moved the trial court to reconsider its order and attached the affidavits of Drs. Bindelglas and Bear and those of two neurologists, Dr. Donald L. Schomer and Dr. Vernon H. Mark, all strongly disagreeing with Dr. Masland's conclusion that no evidence of epilepsy existed and that testing was unnecessary. See Appendices "G", "H", "I" and "J". Noting that an EEG "is one of the most important diagnostic tools in detecting epilepsy", Dr. Bear found Dr. Masland's conclusion "entirely inconsistent with current medical and neurological understanding . . . ." Dr. Schomer took "an exceptionally strong and opposite view to the view of Dr. Maslan [sic] . . .", and concluded that a distinct probability exists that Petitioner has temporal lobe epilepsy. Dr. Mark, too, found a strong possibility of temporal lobe epilepsy and recommended diagnostic testing because Petitioner's record is "obviously incomplete and should be brought up to minimal standards for neurobehavioral evaluation."

Although five psychiatrists (including the state's expert, Dr. Tuchler) and two neurologists concluded that diagnostic testing was essential to Petitioner's only legal defense, the trial court refused to reconsider its order. The court also denied Petitioner's request for monies to pay Dr. Bear's travel expenses so he could testify at Petitioner's trial. As a result, Dr.

Bindelglas was the only medical expert to testify on Petitioner's behalf at a trial where his only defense was insanity. And because the trial court denied diagnostic testing essential to a definitive diagnosis, Dr. Bindelglas could only testify that there was a "definite probability" that Petitioner had temporal lobe epilepsy. The state rebutted that testimony with three prosecution witnesses, Drs. Tuchler, Masland and John S. LaWall (a psychiatrist who had interviewed Petitioner three years earlier for thirty minutes), all of whom testified that Petitioner did not have temporal lobe epilepsy. Not surprisingly, Petitioner was convicted of first degree murder.

Before the penalty trial, Petitioner again moved for diagnostic testing to establish mitigating evidence that Petitioner had organic brain damage at the time of the offense. Petitioner requested appointment of Dr. Bear to assist him in preparing for the sentencing trial and to testify on his behalf. The court denied the motions.

At the penalty trial, Petitioner presented evidence through Dr. Bindelglas, family members and friends about his brutalized and neglected childhood and his severe psychological problems manifested in early childhood and documented since age 13. Despite the overwhelming evidence that Petitioner was very probably insane at the time of the offense, the trial court found five aggravating circumstances and no mitigating circumstances and sentenced Petitioner to death. See Appendix "K".

HOW THE FEDERAL QUESTIONS
WERE RAISED AND DECIDED BELOW

The federal issues that Petitioner raises in this petition concern fundamental constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These issues were presented to the Arizona Supreme Court in Petitioner's appellate briefs challenging his conviction and death

sentence. In a written opinion, the Arizona court rejected these federal constitutional claims and affirmed the conviction and death sentence. In doing so, it expressly refused to follow the Ninth Circuit's holding in Adamson v. Ricketts, 865 F.2d 1011 (1988), which found Arizona's death penalty statute unconstitutional on three of the issues raised here. State v. Vickers, 768 P.2d at 1188, n.2.

REASONS FOR GRANTING THE WRIT

I. Petitioner's right to a fair trial was violated when he was deprived of diagnostic testing that seven medical experts concluded was essential to his substantial insanity defense.

Petitioner's only defense at trial was insanity. Substantial evidence existed that Petitioner had temporal lobe epilepsy and other mental disorders which may have rendered him insane at the time of the offense. Four psychiatrists and two neurologists testified by affidavit that psychological and neurological testing was needed to substantiate the brain disorder. The state's psychiatrist agreed that evidence of temporal lobe epilepsy existed and also recommended diagnostic testing.

The only medical expert to testify otherwise was Dr. Masland who was appointed by the court at the state's request. Based on a fifteen minute interview[1], Dr. Masland concluded that Petitioner

[1] Other courts have recognized that an adequate examination cannot be conducted in only a few moments. Hays v. Murphy, 663 F.2d 1004 (10th Cir. 1981) (30 minute interview inadequate to determine competency of defendant); U.S. v. Walker, 537 F.2d 1192 (4th Cir. 1976) (psychiatric examination by court-appointed state expert, who concluded after 30 minute interview that defendant was competent, was not adequate psychiatric assistance); U.S. v. Chavis, 486 F.2d 1290, 1291 (D.C. Cir. 1973) (50 minute psychiatric examination by court-appointed government psychiatrists not adequate assistance); U.S. v. Taylor, 437 F.2d 371 (4th Cir. 1971) (10 minute interview by psychiatrists who concluded defendant was sane at time of offense was inadequate). Drs. Bindelglas and Bear were highly critical of Dr. Masland's conclusion. Dr. Bindelglas spent three hours interviewing Petitioner. Dr. Bear spent five hours. Both concluded that a strong probability existed that Petitioner has temporal lobe epilepsy. Both concluded that fundamental diagnostic testing was critical to substantiate the

did not have temporal lobe epilepsy and that testing was unnecessary.

Without diagnostic testing, Petitioner was unable to substantiate his insanity defense. This Court recognized in Ake v. Oklahoma, 470 U.S. 68 (1985), that when an indigent defendant's mental status at the time of the offense is a significant factor, due process requires that he be provided psychiatric assistance to build an effective defense. Petitioner was denied due process here when the trial court denied his request for the basic diagnostic tests that all the medical experts except one concluded were essential to an appropriate examination and a competent, definitive diagnosis. By denying Petitioner's court-appointed psychiatrist access to the "raw materials integral to the building of an effective defense"[2], 470 U.S. at 77, the trial court deprived Petitioner of critical evidence to support his only defense. See State v. Sireci, 536 So.2d 231 (Fla. 1988) (defendant deprived of due process when court-appointed psychiatrists failed to conduct additional testing required under reasonable medical standards to determine existence of brain disorder).

There is no question that Petitioner's mental state at the time of the offense was a significant factor. It was his only defense. See U.S. v. Pope, 841 F.2d 954 (9th Cir. 1988)

---

diagnosis.

[2]As this Court recognized in Ake, psychiatric assistance includes the "process of investigation, interpretation, and testimony. . .". 470 U.S. at 80. Other courts agree that due process requires that a defendant be afforded investigative assistance to prepare his defense. Blake v. Kemp , 758 F.2d 523, 529 (11th Cir.), cert. denied, 474 U.S. 998 (1985) (defendant denied fair opportunity to present defense where appointed expert unable to render opinion as to defendant's mental state because state failed to provide expert with necessary information it possessed); Mason v. Arizona, 504 F.2d 1345, 1351 (9th Cir. 1974), cert. denied, 420 U.S. 936 (1975) ("the allowance of investigative expenses or appointment of investigative assistance for indigent defendants in order to ensure effective preparation of their defense. . ." is constitutionally required).

(continuance should have been granted to allow psychiatric evaluation of defendant where insanity only defense); U.S. v. Flynt, 756 F.2d 1352 (9th Cir. 1985) (where insanity is only defense, refusal to grant continuance to afford defendant opportunity to be examined by psychiatrists severely prejudiced defendant). And it was a substantial defense. Seven medical experts, including the state's own expert found evidence of temporal lobe epilepsy and recommended specific diagnostic testing to explore the disorder.

In a similar case, U.S. v. Hartfield, 513 F.2d 254 (9th Cir. 1975), the court reversed the defendant's conviction because he was denied appropriate testing to establish the only defense available to him. After being arrested for attempted robbery, the defendant in Hartfield went into a momentary comatose state. He was subsequently hospitalized and a psychiatrist was appointed to determine his competency to stand trial. The psychiatrist concluded, and the judge agreed, defendant was competent. However, the judge on his own inquired as to whether defendant had "Jacksonian epilepsy" (also known as temporal lobe epilepsy). The judge discussed defendant's need of an EEG and appointed a doctor to conduct a neurological examination.

Like Dr. Masland here, the doctor in Hartfield never performed the EEG and concluded that there was nothing in the defendant's history to suggest temporal lobe epilepsy. The doctor did note that "an EEG in both the sleeping and waking states might be helpful." Based on that statement, defense counsel moved for an order authorizing an EEG. The court denied the motion and defendant was ultimately convicted.

The Ninth Circuit concluded that the trial court's denial of "the motion for a test by means of an EEG stripped him of his only

plausible defense and was error. . ." Id., 513 F. 2d at 258.[3] Here, too, the denial of essential diagnostic testing[4] stripped Petitioner of his only plausible defense.

Although Ake concerned the appointment of a psychiatrist to assist the defendant, it also recognized the defendant's right to access to "a competent psychiatrist who will conduct an appropriate examination . . ." Ake, 470 U.S. at 83 (emphasis added). The court-appointed psychiatrist here, Dr. Masland, was neither competent nor did he assist the defense. He was appointed at the state's request, his "examination" was grossly incomplete and he conducted none of the necessary fundamental diagnostic testing of Petitioner. Ake made clear what due process requires: a competent medical expert to assist the defense. See U.S. v. Crews, 781 F.2d 826, 834 (10th Cir. 1986) (although defendant was examined by four treating or court-appointed psychiatrists, he was entitled to his own psychiatrist to assist him in preparing his defense); U.S. v. Sloan, 776 F.2d at 929 (although defendant was examined by court-appointed psychiatrist requested by government, due process entitled him to expert assistance in presenting defense).

Implicit in Ake is an indigent defendant's right to essential medical testing needed by his court-appointed psychiatrist to render a competent diagnosis and to assist Petitioner effectively in preparing and presenting his insanity defense. This Court should grant review on this issue.

II. The decision below directly conflicts with the decision of the Ninth Circuit which held that Arizona's death penalty statute violates the Sixth Amendment by removing the jury from the

[3]To support its holding, the court relied on both 18 U.S.C. §3006A and the due process requirement of a fair trial. Hartfield, 513 F.2d at 258.

[4]The diagnostic tests recommended by the mental experts were basic to a competent evaluation of Petitioner's mental disorder. See Hays v. Murphy, 663 F.2d at 1012, n. 14, 15.

determination of the elements of the distinct offense of capital murder.

Under Arizona's death penalty statute, the trial judge decides w'ether the elements necessary for a finding of capital murder exist by competent evidence beyond a reasonable doubt. This decision is fundamentally different from the sentencing decision. California v. Ramos, 463 U.S. 992, 1007-08 (1983). It is only the sentencing decision that this Court said may be made by a judge even when the sentencing decision is fact based. Spaziano v. Florida, 468 U.S. 447 (1984); Hildwin v. Florida, ___ U.S. ___ (1989).

The first decision requires the finding of factual elements-set forth as "aggravating circumstances" in Arizona's statute-which are no different than the elements of an offense found by the jury at the guilt/innocence trial. It is a decision that requires proof beyond a reasonable doubt by admissible evidence of the elements necessary to find a defendant guilty of the separate offense of capital murder. A.R.S. §13-703 (C); State v. Jordan, 614 P.2d 825, 828 (Ariz.), cert. denied, 449 U.S. 986 (1980).

In Adamson v. Ricketts, 865 F.2d 1011 (1988), the Ninth Circuit agreed that the aggravating circumstances in Arizona's statute "are additional elements necessary for a finding that a defendant is guilty of the distinctive office of capital murder", 865 F.2d at 1029, and thus, cannot be made by a judge:

> We hold that Arizona has impermissibly identified elements of the crime of capital murder as sentencing factors for determination by a judge, thereby removing their consideration from a jury, in violation of the Sixth Amendment.

Because the decision below conflicts with the Ninth Circuit's

decision in Adamson, other lower courts are divided[5] on this issue, and other cases are pending in this Court on this issue[6], this Court should grant review and decide this issue.

III. The decision below directly conflicts with the decision of the Ninth Circuit which held that Arizona's death penalty statute violated the Eighth and Fourteenth Amendments by precluding the sentencer from considering all relevant mitigating circumstances and presuming death to be the appropriate sentence.

Under Arizona's death penalty statute, once the state presents evidence to establish aggravating circumstances beyond a reasonable doubt, the defendant has the burden to establish by a preponderance of the evidence the existence of mitigating circumstances. State v. McMurtrey, 691 P.2d 1099 (Ariz. 1984), appeal after remand, 726 P.2d 202 (1986), cert. denied 107 S. Ct. 1359 (1987). If the mitigating evidence does not meet the preponderance standard, it cannot be considered in determining the appropriateness of the death penalty. The exclusion of relevant mitigation evidence violates the Eighth and Fourteenth Amendments and enhances " . . . the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett v. Ohio, 438 U.S. 586, 605 (1978). Eddings v. Oklahoma, 455 U.S. 104 (1982) ("Just as the State may not by statute preclude the sentencer from considering, any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence . . ."). See also Woodson v. North Carolina, 428 U.S. 280, 304 (1976); Roberts v. Louisiana, 428 U.S. 325, 333-

[5]See Harper v. Grammer, 654 F.Supp.515 (D.Neb.1987); State v. Creech, 670P.2d 463 (Id. 1983), cert denied, 465 U.S. 1051 (1984); Fitzpatrick v. State, 638 P.2d 1002, 1012 (Mont. 1981). Contra State v. Quinn, 623 P.2d 644 (Ore.1981); State v. Creech, 670 P.2d at 467-505 (dissenting opinion); Fitzpatrick v. State, 638 P.2d at 1041 (dissenting opinion).

[6]See Ricketts v. Adamson, petition for cert. filed, ___ U.S. ___ (Mar. 20, 1989); Walton v. Arizona, petition for cert. filed, ___ U.S. ___ (May 19, 1989).

34 (1976).

For this reason, in Adamson v. Ricketts, 865 F.2d at 1041, the Ninth Circuit held Arizona's death penalty statute unconstitutional as a matter of law:

> [T]he Arizona courts are precluded from weighing evidence of mitigation that, while not satisfying the evidentiary standard, nonetheless may give the sentencer reservations about the appropriateness of imposing a sentence of death. This exclusion of relevant evidence at the weighing stage violates the principle established by Woodson, Roberts, Lockett, Eddings, and reaffirmed in Turner that a sentencing court must weigh all relevant mitigating evidence against the aggravating circumstances.

Because of this burden of proof, the trial court here did not consider the substantial relevant mitigation evidence Petitioner offered. Instead, it concluded that no mitigating circumstances existed because Petitioner had not proven any by a preponderance of the evidence. For example, although Petitioner presented substantial evidence of his brutalized childhood and his severe mental disorders diagnosed by medical experts as early as age 13, the trial court did not consider this evidence because it failed the burden of proof standard:

> The Court finds the evidence presented fails to show by a preponderance of the evidence that Defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired.

See Appendix "K", at p. 5.

The trial court also concluded that Petitioner did not carry his burden in establishing that he was under unusual and substantial duress at the time of the crime because of his abused childhood and mental disorders. The court found "by a preponderance of the evidence that these circumstances do not exist." Id., p. 6. Because Petitioner's sentencer did not

consider this relevant mitigating evidence, Petitioner's death sentence must be reversed. Eddings v. Oklahoma; Lockett v. Ohio.

The Ninth Circuit also held that Arizona's death penalty statute violates the Eighth and Fourteenth Amendments because it imposes a presumption of death by requiring the defendant to bear the burden of proving mitigating circumstances sufficiently substantial to call for leniency. If the defendant does not carry that burden, death must be imposed. As the Ninth Circuit recognized, that scheme:

> . . . precludes the individualized sentencing required by the Constitution [and] . . . removes the sentencing judge's discretion by requiring the judge to sentence the defendant to death if the defendant fails to establish mitigating circumstances by the requisite evidentiary standard, which outweigh the aggravating circumstances.

Adamson, 865 F.2d at 1042 (emphasis in original).

The Eleventh Circuit's recent decision in Jackson v. Dugger, 837 F.2d 1469 (11th Cir.), cert denied 108 S.Ct. 2005 (1988) is in accord. There, the Eleventh Circuit held unconstitutional a jury instruction that death is presumed to be the proper sentence if the aggravating circumstances were not outweighed by the mitigating circumstances. The Eleventh Circuit found that "[s]uch a presumption, if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment." 837 F.2d at 1473.

In addition, the Arizona statute is mandatory: it does not permit the sentencer to decide if the death penalty is the appropriate punishment in an individual case. Where aggravating circumstances are found and no mitigating circumstances sufficiently substantial to call for leniency are found, the trial court must impose death. State v. Zaragoza, 659 P.2d 22, 28 (Ariz.), cert. denied, 462 U.S. 1124 (1983); State v. Gretzler, 659

P.2d at 13.

Because of this last feature, this case presents the same burden of proof issue on which this Court granted review in Blystone v. Pennsylvania, No. 88-6222. But it also presents more: two other, closely related issues on which there is a direct conflict between the court below and the Court of Appeals. Because Blystone cannot resolve all aspects of this conflict, review should be granted here to settle the law.

IV. The decision of the court below is irreconcilable with this Court's decision in Maynard v. Cartwright and the Ninth Circuit's decision in Adamson v. Ricketts.

Petitioner was sentenced to death after the trial court found, and the Arizona Supreme Court agreed, that Petitioner "committed the offense in an especially heinous, cruel, or depraved manner." A.R.S. Section 13-703(F)(6). This statutory aggravating circumstance is almost identical to that found unconstitutional by this Court in Maynard v. Cartwright, 108 S.Ct. 1853 (1988). Like the Oklahoma court in Maynard, the Arizona Court has read this statute in the disjunctive, permitting death sentences to be imposed if the murder can be described in any of its vague terms. State v. Gretzler, 659 P.2d at 10; see Godfrey v. Georgia, 446 U.S. 420, 454 (White, J. dissenting).

Also, like the Oklahoma court in Maynard, the Arizona court has defined this aggravating circumstance in hopelessly vague terms:

> We have objectively defined the relevant terms: a murder is "heinous" if "hatefully or shockingly evil;" "cruel" if "disposed to inflict pain especially in a wanton, insensate or vindictive manner: sadistic;" and "depraved" if "marked by debasement, corruption, perversion or deterioration. ". . . Cruelty focuses on the sensations of the victim before death, depravity focuses on the murderer's state of mind, and heinousness focuses on society's view of the murder as compared to other murders. To use this aggravating circumstance, the trial court must find that the murder is especially heinous,

cruel or depraved.

State v. Ortiz, 639 P.2d 1020, 1031 (Ariz.1981), cert. denied, 456 U.S. 984 (1982) (emphasis in original, citations omitted); see Adamson v. Ricketts, 865 F.2d at 1030-1036.

This Court apparently recognized the remarkable similarity in the two statutes when it remanded another Arizona case, Woratzeck v. Ricketts, 108 S.Ct. 2815 (1988), to the Court of Appeals in light of Maynard. The Arizona court's application of the aggravating circumstance there is the same as its application here.

In Adamson v. Ricketts, the Ninth Circuit also found no distinction between the offending aggravating circumstance in Maynard and that in Arizona's death penalty statute when it held Arizona's "heinous, cruel or depraved" aggravating circumstance unconstitutional:

> Arizona has been unable to provide clearly discernable parameters to establish what kind of conduct falls within the (F)(6) circumstance. The court appears to rely on whatever events are presented to it. The court is therefore free to review the record for any actions or events that it believes to be especially heinous, cruel or depraved. Given the complete lack of any objective standards that guide the court in its decision making, and its unlimited authority to consider any and all facts present in a particular case, we can only conclude that the Arizona Supreme Court's attempts to constitutionally narrow the (F)(6) circumstance have failed.

Adamson, 865 F.2d at 1036-37.

> The (F)(6) circumstance had been applied in an arbitrary and capricious manner in violation of the most basic principles of death penalty jurisprudence.

Adamson, 865 F.2d at 1038.

Because the Arizona courts continue to refuse to follow the principles set forth in Maynard v. Cartwright, review should be granted on this issue as well.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

Denise I. Young
Arizona Capital
Representation Project
Arizona State University
College of Law
Tempe, Arizona 85287-0604
(602) 965-8185

Attorneys for Petitioner

June 20, 1989.

IN THE SUPREME COURT OF THE STATE OF ARIZONA
In Banc

STATE OF ARIZONA, Appellee, v. ROBERT WAYNE VICKERS, Appellant.	Supreme Court No. CR-86-0147-AP Pinal County Superior Court No. CR-9934

Appeal from the Superior Court of Pinal County

Cause No. CR-9934

The Honorabe James E. Don

Affirmed

Robert K. Corbin — Phoenix, Arizona
The Attorney General
By: William J. Shafer III
and
Jack Roberts
Assistant Attorneys General
Attorneys for Plaintiff

Lorona & Associates — Mesa, Arizona
By: Jess A. Lorona
Attorneys for Appellant

CAMERON, Justice

I. JURISDICTION

Defendant, Robert Wayne Vickers, appeals his conviction and sentence of death for the first degree murder of Wilmar "Buster" Holsinger. A.R.S. § 13-1105(A)(1); A.R.S. § 13-703; Ariz. R. Crim. P. 31.2(b), 17 A.R.S. We have jurisdiction pursuant to Ariz. Const. art 6, § 5(3) and A.R.S. §§ 13-4031 and -4033.

II. QUESTIONS PRESENTED

We must address the following issues:

1. Were defendant's due process and equal protection rights violated because the trial court denied defendant's motion for further medical testing?
2. Did the trial court err in ruling that the state could impeach potential defense witnesses regarding their membership in the Aryan Brotherhood?
3. Did the trial court err in finding that defendant's statements made after the fire were voluntary?
4. Did the trial court err in admitting prior bad acts of the defendant?
5. Did the state prove beyond a reasonable doubt that the murder was premeditated?
6. Did the state prove beyond a reasonable doubt that defendant was sane when he committed the offense?
7. Did the trial court err in failing to instruct the jury on the lesser-included offense of manslaughter?
8. Is defendant's death sentence unconstitutional?

III. FACTS

On 4 March 1982, the defendant Robert Wayne Vickers, a prisoner on death row, was released from his cell at approximately 5:00 p.m. to do porter duties. This included picking up trash around the cell pod after meals and also allowed the inmates time out of their cells to shower and talk with other inmates locked in their cells. The pod contained four cells with

one inmate housed in each cell. Sometime between 5:00 and 6:45 p.m., Vickers showed the victim, Wilmar "Buster" Holsinger, a picture of his niece and her crayon drawing which Vickers had received in the mail that day. Upon seeing the pictures, Buster asked Vickers if, referring to Vickers' niece, he had ever "eaten her out."

Vickers was angered by this statement and sometime around 6:45 p.m. he poured five bottles of Vitalis, a hair grooming product containing alcohol, into a plastic ice cream container, placed some tissue in the container, ignited it, and threw the solution on Buster. The evidence showed that Vickers made between three to nine sloshes of the liquid on Buster and in Buster's cell.

Before this, Officer Marling, who was assigned to cover the pod area, had picked up the trash bag that Vickers had placed next to the pod door. Marling left the pod area to dispose of the trash bag and ten minutes later the fire alarm sounded. Alerted by the alarm, Marling returned to the pod area where he met three other prison workers, Captain Padilla, Sergeant Romines and Officer Vancura.

Although the pod was filled with thick smoke, Padilla and Vancura managed to pull Vickers, who was lying on the floor near the pod door, from the pod area. Outside the pod Padilla asked Vickers, "What happened?" and Vickers replied "I burned Buster." Padilla then asked Vickers if Buster was dead and Vickers stated, "He should be, he's on fire."

Padilla, Marling and Vancura then rescued inmate Smith and attempted to rescue inmate Mata. Due to the amount of smoke in the pod, they were unable to rescue Mata until airpacks arrived.

When Smith and Mata were removed from the pod, both were suffering severely from smoke inhalation. Smith was in a semiconscious state while Mata was unconscious. Evidence indicated that had they been left in the smoke-filled pod much longer they would have died from smoke inhalation. After Mata and Smith were rescued, Buster was retrieved and pronounced dead.

From a jury verdict, judgment of guilt and sentence of death, defendant appeals.

IV. TEMPORAL LOBE EPILEPSY

Defendant claims his conviction was unconstitutional because the trial court denied his request for further medical tests. Defendant argues that this violated his due process and equal protection rights.

Defendant relied on insanity as a defense and specifically that he had temporal lobe epilepsy. Dr. Bindelglas, a psychiatrist who testified for the defense, stated that there was a "definite probability" that defendant had temporal lobe epilepsy. However, Dr. Bindelglas testified that no one could positively conclude whether defendant had the physical condition unless defendant underwent further testing and observation. Dr. Bindelglas stated that no facilities in Arizona were suitable for this type of testing. Instead the defendant would have to be transported to an out-of-state facility and undergo observation

for four to six weeks.

The trial court appointed Dr. William Masland, a neurologist, to examine the defendant to determine if he needed further testing. The trial court stated in its minute entry that if Dr. Masland felt further tests were necessary, additional arrangements would be made. After reviewing the defendant's medical records and examining the defendant, Dr. Masland concluded that further diagnostic testing would be "totally superfluous." Two other doctors (Maier I. Tuchler and John S. LaWall) testified that defendant did not have temporal lobe epilepsy. The court denied defendant's motion for further medical tests.

At trial Dr. Tuchler testified:

> Q. Could that series of acts been the result of any kind of epileptic seizure or postictal seizure or anything of that sort?
>
> A. I have an opinion. This is an act that was planned that's characteristic of the person that was impulsive indeed, but not the product of a seizure. ...
>
> * * * *
>
> Now this is not a simple action. This is a complicated volitional act. It does not appear to be the kind of an act that would occur in an individual with a temporal lobe seizure disorder.

Defendant, relying on Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087 (1985), contends that the trial court violated his due process rights by not allowing him the full opportunity to prove his insanity defense. In Ake, the Supreme Court stated:

> [W]hen a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor

> at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one.

Id. at 74, 105 S. Ct. at 1091-92.

The Supreme Court also delineated three factors to be considered in determining whether a state must provide the assistance of a psychiatrist:

> Three factors are relevant to this determination. The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.

Id. at 77, 105 S. Ct. at 1093. These factors may also be analyzed to determine if the state should provide the defendant with further testing.

The first factor is the effect on the private interest if further testing is not provided. Id. Obviously, there is a heavy interest involved when a person's life and liberty are at stake. In the instant case, the court provided defendant with one expert (Dr. Bindelglas) and the question is whether the court must provide more.

The second factor to consider is the effect on the state's interest. Id. In this case, ordering out-of-state testing would have been expensive and a burdensome security problem. The additional testing would have entailed transporting defendant out of state and keeping him under observation and under security for

four to six weeks.

The third factor the Court considered in Ake was the probable value of the additional testing and "the risk of an erroneous deprivation of the affected interest" if the testing is not provided. Id. In this case no indication exists that further testing would have helped defendant prove his insanity defense. The risk of error is minimal given the fact that three expert witnesses testified that the defendant could not have been suffering from a seizure at the time of the killing. Although we can envision fact situations in which the state could be required to shoulder the burden of additional testing, in this case it is not necessary in light of the questionable value to the defendant. We find that the trial court did not err in denying defense counsel's motion for further diagnostic testing.

Defendant also claims that the denial of further medical tests violated the equal protection clause. We disagree. The United States Supreme Court has never held that equal protection requires the state to provide to an indigent defendant everything a wealthy person might be able to afford. Ross v. Moffitt, 417 U.S. 600, 612, 94 S. Ct. 2437, 2444-45 (1974) (states are not required to purchase for the indigent defendant all the assistance that his wealthier counterpart might buy); see San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 24, 93 S. Ct. 1278, 1291 (1973). We find no error.

V. IMPEACHMENT OF POTENTIAL WITNESSES

At trial defendant planned on calling two prison inmates to

testify on his behalf. The two inmates were both members of the Aryan Brotherhood, an organization that allegedly has a creed requiring its members to commit perjury, if necessary, to protect another member of the organization. Defendant claims the trial court erred in a pretrial ruling that the prosecutor could impeach the witnesses with evidence of their membership in the organization. Defendant claims that because of this ruling defense counsel did not call the two inmates to testify on defendant's behalf.

Because the defendant made no offer of proof concerning the substance of the inmates' proposed testimony, we have no way of knowing whether they possessed admissible and relevant evidence. In the absence of an offer of proof, we would not ordinarily consider the issue on appeal. State v. Bay, 150 Ariz. 112, 115, 722 P.2d 280, 283 (1986). However, in view of the nature of this particular case and the sentence imposed, we have decided to consider the merits of the trial court's pretrial ruling concerning the use of impeachment testimony.

We believe that the trial court's ruling was correct. Questioning the witnesses about their obligation and belief would have been proper impeachment. As the United States Supreme Court noted in another case involving the Aryan Brotherhoood:

> We hold that the evidence showing Mills' and respondent's membership in the prison gang was sufficiently probative of Mills' possible bias towards respondent to warrant its admission into evidence. Thus it was within the District Court's discretion to admit Ehle's testimony, and the Court of Appeals was wrong in concluding otherwise.

United States v. Abel, 469 U.S. 45, 49, 105 S. Ct 465, 467 (1984). We find no error.

VI. VOLUNTARINESS OF STATEMENTS

The defendant claims that the trial judge erroneously admitted into evidence three sets of statements Vickers made after the fire. First, Vickers' statements to Captain Padilla immediately after he was pulled from the smoke-filled pod; second, defendant's statements to Officer Vancura while Vancura was standing guard over him; and third, defendant's statements in the squad room to Officer Morgan.

The trial court held a voluntariness hearing and determined that Vickers made all three sets of statements voluntarily, intelligently and knowingly. We will not upset the trial court's determination "absent clear and manifest error." State v. Hein, 138 Ariz. 360, 365, 674 P.2d 1358, 1363 (1983) (citing State v. Arnett, 119 Ariz. 38, 42, 579 P.2d 542, 546 (1978)).

A. Statements Immediately After the Fire

After defendant was pulled from the smoke-filled pod, Captain Padilla asked him what happened and defendant said he "burned Buster." Asked if Buster was dead, defendant answered, "He should be, he's on fire." Defendant claims the trial judge should not have admitted these statements into evidence because defendant was not read his Miranda rights. We disagree for two reasons. First, Miranda warnings are required to be given only when a defendant is in custody and under interrogation. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966). We

do not believe Vickers was under interrogation or in custody when Padilla asked him what happened.

As the United States Court of Appeals for the Ninth Circuit has stated:

> The question in this case is unique because Cervantes was residing in jail when the questioning occured. Cervantes relies on Mathis v. United States, 391 U.S. 1, 88 S. Ct. 1503, 20 L.Ed.2d 381 (1968), for the proposition that any interrogation during prison confinement constitutes custodial interrogation requiring Miranda warnings. We do not read Mathis so broadly. ...
>
> * * * *
>
> Adoption of Cervantes' contention would not only be inconsistent with Miranda but would torture it to the illogical position of providing greater protection to a prisoner than to his nonimprisoned counterpart. We cannot believe the Supreme Court intended such a result. Thus, while Mathis may have narrowed the range of possible situations in which on-the-scene questioning may take place in a prison, we find in Mathis no express intent to eliminate such questioning entirely merely by virtue of the interviewee's prisoner status.

Cervantes v. Walker, 589 F.2d 424, 427 (9th Cir. 1978). See also State v. Cruz-Mata, 138 Ariz. 370, 372-73, 674 P.2d 1368, 1370-72 (1983).

Nor was defendant under interrogation. Under Miranda, the term "interrogation" refers to questioning which the "police should know [is] reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 1689-90 (1980). There is no evidence indicating that Padilla could have known that his question, "What happened?" would elicit an incriminating response from Vickers.

Nor is there any evidence indicating that Vickers was suspected of committing a crime when Padilla asked him what happened. Both Padilla and Vancura testified that they had no idea what had happened. They had no reason to believe, at that point, that a crime had been committed. Vickers was not under interrogation, and Padilla was not required to read Vickers the Miranda warnings.

Second, even if Vickers was under custodial interrogation the statements are, nevertheless, admissible under the public safety exception recognized in New York v. Quarles, 467 U.S. 649, 655, 104 S. Ct. 2626, 2631 (1984).

In Quarles, a woman told police officers that she had been raped by a man who had just walked into a certain supermarket with a gun. The police officers apprehended the defendant in the specified supermarket, frisked him and discovered the defendant was wearing a shoulder holster but was not carrying a gun. The police officer asked the defendant where the gun was and the defendant stated, "the gun is over there." Quarles, 467 U.S. at 652, 104 S. Ct. at 2629. The Supreme Court held that Miranda need not "be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety." Quarles, 467 U.S. at 656, 104 S. Ct. at 2632. The Court stated that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." Quarles, 467 U.S. at 657, 104 S. Ct. at 2632.

In the instant case, Padilla testified that he asked Vickers what happened and whether Buster was dead in order to make a strategic plan of rescuing the other inmates. Padilla testified that, based on Vickers' statements, they decided it would be best to rescue Smith and Mata first before attempting to save Buster. We believe defendant's statements fall under the public safety exception to Miranda.

B. Initiated Conversation

Defendant made a second set of statements to Officer Vancura while Vancura was standing guard over him. Vickers told Vancura that he had "burned the old man up" because Buster had deceived him about his physical incapacity and had made a sexual comment about Vickers' niece. Vancura testified that he did not initiate any conversation with the defendant; rather, Vickers made these statements without being asked anything by Vancura.

Vickers was not under interrogation at this point. Vancura was just watching the defendant until an investigating officer arrived. The Miranda warnings did not have to be given and the statements were admissible. Miranda v. Arizona, 384 U.S. 436, 478, 86 S. Ct. 1602, 1630 (1966) ("Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence.").

C. Physical Condition Precluding Defendant From Waiving His Rights

The third set of statements Vickers made was when he spoke to

Officer Morgan, the investigating officer. Morgan read Vickers his Miranda rights which Vickers waived. Defendant now claims that, because he was still suffering from smoke inhalation, his physical condition made it impossible to voluntarily, intelligently and knowingly waive his rights. In support of this argument defendant relies on Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408 (1978). In Mincey, the Supreme Court held that, because of the defendant's physical condition, his statements made to police officers were not voluntarily, intelligently and knowingly made and thus could not be used against him. Mincey, 437 U.S. at 399, 98 S. Ct. at 2418. However, in Mincey, police officers interrogated the defendant while he was in a hospital intensive care unit and was "depressed almost to the point of coma . . . ." Mincey, 437 U.S. at 398, 98 S. Ct. at 2416. Mincey was "evidently confused and unable to think clearly" and was "encumbered by tubes, needles, and breathing apparatus." Mincey, 437 at 398-99, 98 S. Ct. at 2417.

Vickers' condition when he was questioned by Morgan was not as serious as Mincey's. Morgan testified that when he questioned the defendant, Vickers appeared to be fine, and talked coherently and rationally. Officer Vancura, who was present when Morgan questioned the defendant, testified that Vickers was breathing and speaking normally. Because Vickers' physical condition was clearly distinguishable from Mincey's condition, Mincey does not apply. See also United States v. Martin, 781 F.2d 671 (9th Cir. 1985) (defendant's statements considered voluntary even though made while he was in the hospital, under the influence of Demerol

(a pain killer), and was only "relatively coherent" during questioning).

We believe Vickers' statements were "'the product of a rational intellect and a free will.'" Townsend v. Sain, 372 U.S. 293, 307, 83 S. Ct. 745, 754 (1963) (quoting Blackburn v. Alabama, 361 U.S. 199, 208, 80 S. Ct. 274, 280 (1960)). The trial court did not err in admitting defendant's statements.

VII. PRIOR BAD ACTS

Defendant claims the trial court erred in admitting evidence of defendant's other bad acts. At trial Dr. Bindelglas repeatedly referred to "episodic violence" and "random behavior" in Vickers' background. Dr. Bindelglas linked this to the possibility that defendant had temporal lobe epilepsy, which was the core of defendant's insanity defense. To refute Dr. Bindelglas' testimony, the state proffered evidence of three bad acts committed by the defendant which showed that defendant's violent acts were neither random nor senseless, but were calculated and self-promoting and thus were not linked to temporal lobe epilepsy.

The state first introduced evidence that in 1974 or 1975 defendant attacked a farmer. The evidence showed that the reason defendant attacked the farmer was because he had caught defendant burglarizing a farm. The state next introduced evidence that defendant attacked his cellmate in 1978. Evidence indicated that defendant had done this because he was afraid his cellmate was

going to attack him, and defendant attacked as a preemptive strike out of fear. Finally, the state introduced evidence that defendant attacked Thomas Coco in 1983. The state showed that defendant attacked Coco because Coco had agreed to testify against defendant in this matter.

Normally evidence of prior bad acts is not admissible to show that the defendant is a bad person or has a propensity for committing crimes. State v. Amarillas, 141 Ariz. 620, 622, 688 P.2d 628, 630 (1984). However, when a defendant asserts insanity as a defense "'any and all conduct of the person is admissible in evidence.'" United States v. Smith, 507 F.2d 710, 711 (4th Cir. 1974) (quoting 1 Wigmore, Evidence § 228 (1940)). When insanity is at issue, evidence of prior bad acts is admissible if relevant, Ariz. R. Evid. 402, and if the probative value of the evidence is not substantially outweighed by unfair prejudice, Ariz. R. Evid. 403. See State v. Amarillas, 141 Ariz. 620, 623, 688 P.2d 628, 631 (1984).

In the instant case, defendant's bad acts were relevant because they tended to show that any violence committed by the defendant was deliberate, not random, and thus not caused by temporal lobe epilepsy.

Defendant claims, however, that the probative value of these acts was substantially outweighed by unfair prejudice. Admittedly, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Ariz. R. Evid. 403.

In this case, the trial court was careful to prevent undue

prejudice. The court only allowed the state to show that Vickers had attacked the farmer, not that he had shot at him. Also, the court only permitted the prosecutor to mention that defendant had attacked his cellmate, not that he had killed him. Nor was the cellmate's name (Frank Ponciano) mentioned for fear the jurors might recognize the name and recall defendant's previous, highly publicized murder trial. Nor did the state place into evidence defendant's statements that he would have killed Coco if he could have.

The weighing and balancing of the probative value against the prejudice of evidence is "within the discretion of the trial court and will not be disturbed on appeal unless it has been clearly abused." State v. Williams, 133 Ariz. 220, 230, 650 P.2d 1202, 1212 (1982). The trial court sufficiently alleviated any unfair prejudice and did not abuse its discretion in admitting defendant's bad acts. We find no error.

VIII. PREMEDITATION

Defendant claims the state did not prove premeditation beyond a reasonable doubt. State v. Kreps, 146 Ariz. 446, 449, 706 P.2d 1213, 1216 (1985); State v. White, 144 Ariz. 245, 246, 697 P.2d 326, 327 (1985).

Premeditation is defined as follows:

> 1. "Premeditation" means that the defendant acts with either the intention or the knowledge that he will kill another human being, when such intention or knowledge precedes the killing by a length of time to permit reflection. An act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion.

A.R.S. § 13-1101.

In order to carry its burden, the state must prove that the defendant "made a decision to kill prior to the act of killing, that 'a plan to murder was formed after the matter had been made a subject of deliberation and reflection.'" State v. Lacquey, 117 Ariz. 231, 234, 571 P.2d 1027, 1030 (1977) (quoting Macias v. State, 36 Ariz. 140, 149, 283 P. 711, 715 (1929)). The standard of review upon appeal is "whether there was sufficient evidence that a rational trier of fact could have found guilt beyond a reasonable doubt." State v. Tison, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981) (citing Jackson v. Virginia, 443 U.S. 307, 324, 99 S. Ct. 2781, 2792 (1979)), cert. denied, 459 U.S. 882, 103 S. Ct. 180 (1982).

Defendant claims the evidence did not show that he had enough time to premeditate. Defendant bases this argument on the fact that when Officer Marling left the pod area to dispose of the trash ten minutes before the fire alarm sounded, defendant did not appear agitated. This was not required. Premeditation may be as "instantaneous as successive thoughts of the mind ... ." Kreps, 146 Ariz. at 449, 706 P.2d at 1216. The facts show that sometime after Buster made the obscene statement, Vickers went back to his cell, poured five bottles of Vitalis into a plastic container, put tissue into the container and ignited it. This is strong evidence of premeditation.

Defendant also claims the evidence only proves that he intended to burn Buster, not kill him. Defendant bases this argument on the fact that when Vickers was pulled from the pod

and asked what happened he replied, "I burned Buster" rather than stating that he had "killed Buster." However, this ignores the fact that when Padilla asked if Buster was dead, Vickers exclaimed, "He should be, he's on fire." We believe the evidence shows the defendant intended to kill Buster or at least knew that he would kill Buster when he threw the firebomb on him. We find no error.

IX. PROOF OF SANITY

Defendant claims the state did not meet its burden of proving that he was sane beyond a reasonable doubt at the time he burned Buster. A defendant is presumed to be sane. State v. Berndt, 138 Ariz. 41, 45, 672 P.2d 1311, 1315 (1983). However, under the statute in effect at the time, once the defendant raises the issue of insanity, the burden is on the state to prove the defendant was sane beyond a reasonable doubt.[1] State v. McShine, 131 Ariz. 485, 487, 642 P.2d 482, 484 (App. 1982).

The state produced three expert witnesses each of whom testified that defendant was sane at the time of the offense. Also, the jury heard the statements defendant made directly after the killing which showed that defendant knew exactly what he had done.

---

[1] The legislature has since shifted the burden of proof to the defendant. A.R.S. § 13-502(B). However, the old law applies in this case because the defendant committed the offense before A.R.S. § 13-502(B) went into effect. State v. Clabourne, 142 Ariz. 335, 345, 690 P.2d 54, 64 (1984); State v. Coconino County Superior Court Division II, 139 Ariz. 422, 426-27, 678 P.2d 1386, 1390-91 (1984).

Evidence presented at trial indicated that defendant might suffer from temporal lobe epilepsy. Dr. Bindelglas testified that there is a "definite probability" that Vickers has temporal lobe epilepsy. However, Dr. Bindelglas admitted that a person who has temporal lobe epilepsy is not necessarily legally insane. Only when the person is having a seizure or is in a disassociative state would the person not know right from wrong.

Drs. Masland, Tuchler and LaWall each testified that defendant was legally sane when he committed the murder. All three experts also testified that, given the complexity of the volitional acts taken in the commission of the killing, defendant could not have been having a seizure at the time he killed Buster.

We believe reasonable minds could conclude that defendant was sane beyond a reasonable doubt. The state met its burden of proof and, because substantial evidence supported the jury's verdict, we are bound by that verdict. State v. Berndt, 138 Ariz. 41, 46, 672 P.2d 1311, 1316 (1983); State v. McShine, 131 Ariz. 485, 487, 642 P.2d 482, 484 (App. 1982).

X. FAILURE TO GIVE MANSLAUGHTER INSTRUCTION

Defendant claims it was error for the trial court not to instruct the jury on manslaughter. The court must instruct the jury on every lesser-included offense to the one charged if the evidence supports the giving of the instruction. Ariz. R. Crim P. 23.3, 17 A.R.S. See State v. Celaya, 135 Ariz. 248, 251, 660 P.2d 849, 852 (1983) (citing State v. Dugan, 125 Ariz. 194, 195,

608 P.2d 771, 772 (1980)). Our manslaughter statute states:

> A person commits manslaughter by:
>
> 1. Recklessly causing the death of another person; or
>
> 2. Committing second degree murder . . . upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim . . . .

A.R.S. § 13-1103.

A. Reckless Murder

"Recklessly" is defined as follows:

> "Recklessly" means . . . that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

A.R.S. § 13-105(6)(c).

The record does not support a reckless manslaughter instruction. Defendant did not recklessly disregard the risk to Buster. Defendant created the risk. Defendant had to go to his cell, pour several bottles of Vitalis into a container, add tissue paper, ignite the container and throw it on the victim. Considering all of these preparatory and deliberate steps, Buster's death cannot be considered to have been caused recklessly. We find no error.

B. Heat of Passion

A defendant is entitled to a manslaughter instruction if the

evidence establishes that the homicide was committed in the heat of passion aroused by adequate provocation. State v. Doss, 116 Ariz. 156, 162, 568 P.2d 1054, 1060 (1977) (citing State v. Johnson, 112 Ariz. 17, 536 P.2d 1035 (1975)). Defendant claims his actions were done in the heat of passion resulting from adequate provocation by the victim. We disagree.

The evidence indicates that defendant murdered Buster because Buster made an obscene statement concerning defendant's niece. However, words alone are not adequate provocation to justify reducing an intentional killing to manslaughter. Doss, 116 Ariz. at 162, 568 P.2d at 1060.

> [I]t is the general rule that mere language, however aggravated, abusive, opprobrious or indecent, whether directed at the slayer personally or spoken concerning his female relative, is not sufficient provocation to reduce a killing . . . from premeditated murder to manslaughter.

40 Am. Jur. 2d Homicide § 64, quoted in State v. Doss, 116 Ariz. 156, 162, 568 P.2d 1054, 1060 (1977). The evidence did not support a manslaughter instruction.

C. Harmless Error

Even if the trial court erred by failing to give a manslaughter instruction, the error was harmless because the jury, though instructed on the lesser-included offense of second degree murder, still convicted defendant of first degree murder. "[B]y finding defendant guilty of the highest offense, to the exclusion of the immediately lesser-included offense, second degree murder, the jury necessarily rejected all other

lesser-included offenses. The error, if indeed it was error, of not instructing as to such offenses was harmless." State v. White, 144 Ariz. 245, 247, 697 P.2d 328, 330 (1985); see also State v. Nowlin, 244 N.W.2d 591, 596 (Iowa 1976) ("Where both first and second-degree murder verdicts are submitted and a first-degree murder conviction is returned there is no prejudice for failure to instruct on manslaughter.").

XI. DEATH PENALTY ISSUES[2]

A. Constitutionality

---

[2] We are aware of the decision of the United States Court of Appeals for the Ninth Circuit in Adamson v. Ricketts, D.C. No. Civ. 83-2323 PHX (9th Cir. filed Dec. 22, 1988), which holds that Arizona's death penalty statute is unconstitutional. The Ninth Circuit opinion invalidates our death penalty scheme on some of the same grounds Vickers raises here. We note that the grounds on which the Ninth Circuit rested its constitutional holdings are grounds on which different courts may reasonably hold differing views of what the Constitution requires. Until the United States Supreme Court instructs us that our interpretations are incorrect, we will continue to apply them.

The most troubling portion of the Ninth Circuit opinion is that part which concludes that this court has failed in its duty to prevent the arbitrary and capricious application of A.R.S. § 13-703(F)(6), the "especially heinous, cruel, or depraved" aggravating circumstance. Adamson slip op. at 39-63. We have attempted to give a narrowing interpretation to these admittedly broad subjective terms. See State v. Gretzler, 135 Ariz. 42, 50-53, 659 P.2d 1, 9-12, cert. denied, 461 U.S. 971, 103 S. Ct. 2444 (1983). We believe we have successfully narrowed § 13-703(F)(6), and that we have applied that narrow interpretation consistently. But here, too, reasonable jurists may differ. See Adamson, slip op. at 24-34 (Brunetti, J., dissenting) (arguing that the Arizona Supreme Court has sufficiently narrowed and consistently applied the heinous, cruel, or depraved aggravating factors). But, as stated above, the United States Supreme Court will have the opportunity to have the final word on the constitutionality of our interpretation and application of § 13-703(F)(6). If the United States Supreme Court holds that section unconstitutional on its face or as applied, or otherwise invalid, we will comply with the Court's opinion.

Defendant claims the Arizona death penalty statute, A.R.S. § 13-703, is unconstitutional on its face for the following reasons: 1) the jury takes no part in the sentencing determination; 2) the death penalty statute is mandatory and not individualized; 3) the statute places the burden of proving mitigating circumstances on the defendant; and, 4) the "heinous, cruel or depraved" aggravating circumstance is unconstitutionally vague on its face.

1. Jury Input

We have previously rejected defendant's claim that the Arizona death penalty is unconstitutional because the jury does not participate in sentencing, and we do so again. State v. Bracy, 145 Ariz. 520, 536, 703 P.2d 464, 480 (1985), cert. denied, 474 U.S. 1110, 106 S. Ct. 898 (1986); State v. Poland, 144 Ariz. 388, 403, 698 P.2d 183, 188 (1985), aff'd, 476 U.S. 147, 106 S. Ct. 1749 (1986). The United States Supreme Court has recognized that "jury sentencing in a capital case can perform an important societal function." Proffitt v. Florida, 428 U.S. 242, 252, 96 S. Ct. 2960, 2966 (1976) (citing Witherspoon v. Illinois, 391 U.S. 510, 519 n.15, 88 S. Ct. 1770, 1775 n.15 (1968)). However, the Court has "never suggested that jury sentencing is constitutionally required." Proffitt, 428 U.S. at 252, 96 S. Ct. at 2966. See also McCleskey v. Kemp, _____ U.S. _____, 107 S. Ct. 1756, 1773 n.25 (1987); State v. Harding, 137 Ariz. 278, 293, 670 P.2d 383, 398 (1983), cert. denied, 465 U.S. 1013, 104 S. Ct. 1017 (1984). We find no error.

2. Mandatory Death Penalty

A.R.S. § 13-703(E) states:

> [T]he court shall take into account the aggravating and mitigating circumstances . . . and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

(Emphasis added). Defendant argues that because of the words "shall impose" the statute prohibits individualized sentencing and operates as a mandatory death penalty statute in violation of Roberts v. Louisiana, 431 U.S. 633, 97 S. Ct. 1993 (1977). We do not agree.

In Roberts, a Louisiana statute mandated the death penalty for any person convicted of the first degree murder of a police officer, regardless of the defendant's character and record or the circumstances of the particular offense. Roberts, 431 U.S. at 634, 97 S. Ct. at 1994. The Court held it was unconstitutional to presume that no mitigating circumstances sufficient to call for leniency existed whenever the victim was a police officer. Id. at 636-37, 97 S. Ct. at 1995.

Our statute is different from the Louisiana statute because it requires the trial judge to consider the evidence presented in mitigation including the defendant's character and record, and the circumstances of the offense. The death penalty is mandatory only after the judge has considered the evidence presented in mitigation and determined that no mitigating factors sufficient to call for leniency exist. We do not believe the Arizona death penalty statute constitutes an improper mandatory sentencing

procedure. State v. Smith, 146 Ariz. 491, 500, 707 P.2d 289, 298 (1985); State v. Jordan, 137 Ariz. 504, 508, 672 P.2d 169, 173 (1983).

3. Burden of Proving Mitigating Circumstances

Defendant also claims that the statute is unconstitutional on its face because it places the burden of proving mitigating circumstances on the defendant. We again reject this argument and repeat what we have previously stated:

> Once the defendant has been found guilty beyond a reasonable doubt, due process is not offended by requiring the defendant to establish mitigating circumstances. As we stated in State v. Smith, 125 Ariz. 412, 416, 610 P.2d 46, 50 (1980), "[f]acts which would tend to show mitigation are peculiarly within the knowledge of a defendant."

State v. Richmond, 136 Ariz. 312, 316, 666 P.2d 57, 61, cert. denied, 464 U.S. 986, 104 S. Ct. 435 (1983); see also State v. Bracy, 145 Ariz. 520, 536, 703 P.2d 464, 480 (1985), cert. denied, 474 U.S. 1110, 106 S. Ct. 898 (1986).

4. Heinous, Cruel or Depraved

Finally, defendant argues that Arizona's "heinous, cruel or depraved" aggravating circumstance is unconstitutionally vague. The United States Supreme Court recently held Oklahoma's aggravating circumstance of "especially heinous, atrocious or cruel" to be void for vagueness. Maynard v. Cartwright, ____ U.S. ____, 108 S. Ct. 1853 (1988). One reason for doing so was because the statute failed to adequately inform the jury of what they must find to impose the death penalty and thus left the jury and appellate courts with unfettered discretion. Maynard, ____ U.S. at ____, 108 S. Ct. at 1859. We note that in Arizona, the

judge and not the jury determines the death penalty.

We do not believe our statute falls under Maynard. We believe our statute falls under Proffitt v. Florida, 428 U.S. 1242, 96 S. Ct. 2960 (1976). In Proffitt, the Supreme Court considered Florida's "especially heinous, atrocious, and cruel" aggravating circumstance and held that the terms, as construed by the Florida Supreme Court, were not unconstitutionally vague. The Court stated, "We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases." Proffitt, 428 U.S. at 255-56, 96 S. Ct. at 2968.

We believe we have sufficiently defined the terms "heinous, cruel and depraved" to prevent the sentencing judge from having unfettered discretion. These terms as applied by the Arizona courts are not void for vagueness. State v. Smith, 146 Ariz. 491, 503, 707 P.2d 289, 301 (1985); State v. Gretzler, 135 Ariz. 42, 51, 659 P.2d 1, 10, cert. denied, 461 U.S. 971, 103 S. Ct. 2444 (1983); State v. Ortiz, 131 Ariz. 195, 206, 639 P.2d 1020, 1031 (1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2259 (1982).

B. Independent Review

We have the duty to independently review the existence of aggravating or mitigating circumstances and to independently determine the propriety of the sentence. State v. Gretzler, 135 Ariz. 42, 57, 659 P.2d 1, 16, cert. denied, 461 U.S. 971, 103 S. Ct. 2444 (1983).

1. Aggravating Circumstances

The trial judge found the existence of five aggravating circumstances. First, that the defendant was previously convicted of another offense for which, under Arizona law, life imprisonment or death was imposable. To support this aggravating circumstance, the court found the following:

> A. On July the 24th, 1978, the defendant, Robert Wayne Vickers, was adjudged guilty in Pinal County Superior Court, Cause Number 7779, of the crime of assault with a deadly weapon while armed with a deadly weapon, a violation of Arizona Revised Statutes, Section 13-249(B), as amended.
>
> The imposable sentence under the statute section in effect at that time was the minimum term of five years and a maximum term of life imprisonment in the State Prison.
>
> B. On August the 13th, 1979, the defendant, Robert Wayne Vickers, was adjudged guilty in Pinal County Superior Court, Cause Number 8058, of the crime of murder in the first degree, in violation of A.R.S. 13-1105(A)(1), and was sentenced to death.
>
> C. On July the 28th, 1980, the defendant, Robert Wayne Vickers, was adjudged guilty in Pinal County Superior Court, Cause Number 8471, of the crime of dangerous or deadly assault by a prisoner, a dangerous felony, in violation of A.R.S. 13-1206, and also received life imprisonment.

Incident B refers to Vickers' previous conviction of the first degree murder of his cellmate, Frank Ponciano. However, this conviction has been set aside and a new trial ordered. See Vickers v. Ricketts, 798 F.2d 369 (9th Cir. 1986), cert. denied, 479 U.S. 1054, 107 S. Ct. 928 (1987). Therefore, this offense does not support the trial court's finding of this aggravating circumstance. Nevertheless, the two remaining offenses (A and C) are valid and were punishable under Arizona law by life

imprisonment. Therefore, we find that this aggravating circumstance exists. See State v. Smith, 146 Ariz. 491, 707 P.2d 289 (1985) (elimination of some aggravating factors in the absence of mitigating circumstances does not mandate a remand to the trial court for resentencing).

The second aggravating circumstance the trial court found was that the defendant was previously convicted of a felony involving the use or threat of violence on another person. The trial court listed the same three incidents to support this aggravating circumstance. Again, the second incident can no longer support this aggravating circumstance because this murder conviction has been reversed. However, because of the validity of the other two incidents, this aggravating circumstance still stands.

The trial court found as a third aggravating circumstance that the defendant, in the commission of this offense, knowingly created a grave risk of death to another person in addition to the victim. We find that this aggravating circumstance exists. The evidence showed that two inmates' lives were endangered. When rescued, inmate Mata was unconscious and inmate Smith was semiconscious. The evidence showed that had they been left in the pod much longer, they would have died from smoke inhalation. The defendant knowingly created the condition that constituted a grave risk of death to Smith and Mata.

The trial court also found that defendant committed the murder in an especially heinous, cruel and depraved manner. The trial court found the following:

> The defendant, Robert Wayne Vickers, after having thrown inflammable liquid upon

the physically disabled victim and igniting him, and while the victim was attempting to put out the flames, tossed another container of flammable liquid on the victim.

Evidence at the trial disclosed Holsinger suffered great pain. Mr. Holsinger received multiple sloshes of burning flammable liquid over most of his body. These contact burns even included the normally protected areas under his arm. According to Fire Marshal David Dale's testimony, this indicated he received part of the attack while standing upright with his arms upraised in an apparent attempt to combat the fire raging around his head.

Burns covered virtually all of his body. He died from burns to his bronchial tubes and lungs.

Immediately afterward, when asked if Holsinger was dead, Vickers responded, "He ought to be. He's on fire."

Holsinger was completely helpless. He was a physically handicapped man locked in his cell. He had no way to escape and no defense.

Vickers had not been harmed by Holsinger and gained nothing by the crime. Vickers relished the crime, killed a completely helpless individual, and killed senselessly.

We believe the offense was especially heinous (State v. Ortiz, 131 Ariz. 195, 210, 639 P.2d 1020, 1035 (1981) (murder, in which defendant stabbed victims and then poured gasoline on or near the victims and ignited the gasoline, was "far more heinous and depraved than the norm of first degree murders"), cert. denied, 456 U.S. 984, 102 S. Ct. 2259 (1982)), and cruel (State v. Harding, 141 Ariz. 492, 501, 687 P.2d 1247, 1256, (1984) (murder, in which defendant bound and gagged the victim such that victim did not die instantaneously, but died slowly from asphyxiation, was clearly "committed in a cruel manner")), and

depraved (Ortiz, supra).

The trial court also found that the defendant committed the offense while in the custody of the Department of Corrections. We also find that the record supports this aggravating circumstance.

2. Mitigating Circumstances

The trial court found no mitigating circumstances sufficient to call for leniency. Defendant argues that, because he was under 25 when he committed the offense, the trial court erred in not finding his age to be a mitigating factor. Defendant was 23 years old at the time he committed the crime.

Although age may be considered a mitigating factor, A.R.S. § 13-703(G)(5), our statute does not prescribe what age is a mitigating factor. We have previously refused to hold age as a mitigating factor in cases where the defendant was younger than Vickers. State v. Clabourne, 142 Ariz. 335, 348, 690 P.2d 54, 67 (1984) (age was not a mitigating factor for defendant who was 20 years old); State v. Gillies, 142 Ariz. 564, 571, 691 P.2d 655, 662 (1984) (age was not a mitigating factor for defendant who was 20 years old), cert. denied, 470 U.S. 1059, 105 S. Ct. 1775 (1985). In light of defendant's prior criminal history, we agree with the trial court that defendant's age was not a mitigating factor substantial enough to call for leniency.

We have reviewed the record and do not believe there are any other mitigating circumstances sufficient to call for leniency.

C. Proportionality Review

In addition to making an independent determination of the aggravating and mitigating circumstances, we must also determine if the sentence imposed is proportional to other death penalties imposed in Arizona and other jurisdictions. State v. Richmond, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976), cert. denied, 433 U.S. 915, 97 S. Ct. 2988 (1977).

We have considered other Arizona cases in which the death penalty was imposed and we do not believe defendant's sentence was excessive or disproportionate to those cases. State v. Smith, 131 Ariz. 29, 638 P.2d 696 (1981) (death penalty upheld when trial court found no mitigating circumstances and found aggravating circumstances of prior convictions punishable by life imprisonment, offense committed in an especially heinous, cruel or depraved manner and prior conviction involving violence); State v. Mata, 125 Ariz. 233, 609 P.2d 48 (death penalty upheld when no mitigating circumstances found and aggravating circumstances were prior conviction punishable by life imprisonment and heinous, cruel or depraved), cert. denied, 449 U.S. 938, 101 S. Ct. 388 (1980); State v. Evans, 124 Ariz. 526, 606 P.2d 16 (death penalty upheld when no mitigating circumstances found and aggravating circumstance of prior conviction involving violence was found), cert. denied, 449 U.S. 891, 101 S. Ct. 252 (1980).

We have also reviewed cases from other jurisdictions in which the defendant murdered a fellow inmate and received the death penalty. Murphy v. State, 454 S.W.2d 302 (Ark. 1970); State v. Parkus, 753 S.W.2d 881 (Mo. 1988); State v. Zeitvogel, 707 S.W.2d 365 (Mo. 1986); State v. Guinan, 665 S.W.2d 325 (Mo. 1984). In Murphy v. State, the defendant stabbed a fellow inmate and his death sentence was affirmed

by the Arkansas Supreme Court. In State v. Zeitvogel, the defendant, who strangled his cellmate with a double-stranded wire, was also given the death penalty. In that case the defendant had also participated in a previous killing of a fellow inmate as had Vickers. We do not believe defendant's death penalty was excessive or disproportionate to the penalties imposed in similar cases considering the crime and the defendant.

XII. ANDERS

Defendant's attorney, in addition to the issues discussed above, raised additional "arguable issues" pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967) and State v. Leon, 104 Ariz. 297, 451 P.2d 878 (1969). The defendant's attorney stated:

> [C]ounsel for Appellant has conscientiously reviewed the record for any fundamental or reversible error pertaining to this portion of Appellant's brief and has found none. Counsel for Appellant has set forth in this portion of the brief "arguable issues" which he has researched and has determined that the case law does not support any error. Therefore, counsel and Appellant request that the Court search the entire record for error pertaining to the issues set forth below. A.R.S. Section 13-4035.

Appellant's Opening Brief at 41.

We have considered defendant's "arguable issues" and have examined the entire record for fundamental error pursuant to A.R.S. § 13-4035, Anders, supra; Leon, supra. We find no error.

XIII. DISPOSITION

The defendant's conviction and death sentence are affirmed.

JAMES DUKE CAMERON, Justice

CONCURRING:

FRANK X. GORDON, JR., Chief Justice

STANLEY G. FELDMAN, Vice Chief Justice

JAMES MOELLER, Justice

Justice William A. Holohan participated in this matter but retired prior to the filing of this opinion; Justice Robert J. Corcoran did not participate in the determination of this matter.

Supreme Court

NOEL K. DESSAINT
CLERK OF COURT

STATE OF ARIZONA
201 WEST MAIN STATE CAPITOL
1700 WEST WASHINGTON
PHOENIX, ARIZONA 85007-3299

TELEPHONE 602-542-4536

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

March 22, 1989

RE: **STATE OF ARIZONA vs. ROBERT WAYNE VICKERS**
Supreme Court No. CR-86-0147-AP
Pinal County No. 9934

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on March 21, 1989, in regard to the above-referenced cause:

ORDERED: Motion for Reconsideration = DENIED.

Justice Corcoran, having recused himself, did not participate in the determination of this matter.

Justice Moeller was not present and did not participate in the determination of this matter.

Mandate enclosed.

NOEL K. DESSAINT, Clerk

TO:

Hon. Robert K. Corbin, Attorney General, 1275 W. Washington, Phoenix, AZ 85007 Attn: Jessica Funkhouser, Esq., and Jack Roberts, Esq.
Jess A. Lorona, Esq., Lorona & Associates, 1811 South Alma School Rd., Suite 175, Mesa, AZ 85202
Robert Wayne Vickers #37250, Arizona State Prison, Box 629, Florence, AZ 85232
Roy A. Mendoza, Pinal County Attorney, P.O. Box 887, Florence, AZ 85232
Hon. James E. Don, Pinal County Superior Court, P.O. Box 828, Florence, AZ 85232
Alma J. Haught, Clerk, Pinal County Superior Court, Pinal County Courthouse, Florence, AZ 85232

em

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PINAL

THE STATE OF ARIZONA, Plaintiff, vs. ROBERT WAYNE VICKERS, Defendant.	NO. 9934 SPECIAL VERDICT

On October 25, 1985, the Defendant, Robert Wayne Vickers was found guilty by a jury, of the murder of William G. Holsinger committed on March 4, 1982.

Thereafter, on April 8, 1986, a Special Sentencing Hearing was conducted in accordance with the provisions of A.R.S. Sec. 13-703 B.

All the material contained in the presentence report was disclosed to the attorney for the State and to the Defendant, Robert Wayne Vickers and his counsel.

The State relied on the evidence received at trial as to the aggravating circumstances set forth in Sec.13-703 F, Arizona Revised Statutes and presented additional testimony and presented Exhibit 36, Judgments of Prior Convictions.

The Defendant and his counsel were further given the opportunity to establish the existence of any circumstances in mitigation as set forth in Sec. 13-703 G as allowed in State vs. Watson, 120 Ariz. 441, 586 P.2d 1253. Additional testimony was offered by the Defendant by way of witnesses and testimony of family members of the Defendant. Additional testimony was

offered by the Defendant by way of Dr. Bindelglas, admitted in evidence and considered by the Court.

In addition, the Court reviewed the trial testimony and statements in the Court record and testimony of Dr. Bindelglas at the trial and statements of the other psychiatrist in the trial and their written reports on file with the Court.

All the material contained in the presentence report was disclosed to the attorney for the State and to the Defendant.

Based upon the presentation at the Sentencing Hearing and evidence presented at the trial of this case, the Court now sets forth its findings as to the existence or nonexistence of each of the aggravating circumstances set forth in Paragraph F of A.R.S. Sec. 13-703, and the mitigating circumstances as set forth in Paragraph G of A.R.S. Sec.13-703 G as allowed by the decision of the Arizona Supreme Court in State vs. Watson, supra, and State vs. Leslie, 708 P.2d 719 (October 9, 1985).

AGGRAVATING CIRCUMSTANCES

1. The Defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

FINDING: The Court finds that this circumstance does exist beyond a reasonable doubt.

A) On July 24, 1978, the Defendant, Robert Wayne Vickers, was adjudged guilty in Pinal County Superior Court (Cause No. 7779) of the crime of Assault with a Deadly Weapon while Armed with a Deadly Weapon, a violation of Arizona Revised Statutes, Sec. 13-249 B (as amended, Laws 1976). The imposable sentence under the statute section in effect at that time was a minimum term of five years and a maximum term of life imprisonment in the state prison.

B) On August 13, 1979, the Defendant, Robert Wayne Vickers, was adjudged guilty in Pinal County Superior Court (Cause No. 8058) of the crime of Murder in the First Degree, in violation of A.R.S. Sec. 13-1105(A)(1), and was sentenced to death.

C) On July 28, 1980, the Defendant, Robert Wayne Vickers, was adjudged guilty in Pinal County Superior Court (Cause No. 8471) of the crime of Dangerous or Deadly Assault by a Prisoner, a dangerous felony, in violation of A.R.S. Sec. 13-1206, and received Life Imprisonment.

2. The Defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

FINDING: The Court finds that this circumstance does exist beyond a reasonable doubt.

A) The Defendant, Robert Wayne Vickers, in his prevous conviction which occurred on July 24, 1978, was convicted of stabbing another inmate at the Arizona State Prison and causing bodily injury to the victim.

B) The Defendant, Robert Wayne Vickers, in his previous conviction which occurred on August 13, 1979, murdered another person.

C) The Defendant, Robert Wayne Vickers, in his previous conviction which occurred on July 28, 1980, was convicted of a dangerous offense which involved the use or threat of violence on another person.

3. In the commission of the offense the Defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

FINDING: The Court finds that this circumstance does exist beyond a reasonable doubt.

The evidence produced at trial demonstrated that as a result of the fire set by the Defendant, two other inmates, Mata and Smith, were overcome by smoke, and inmate Mata was rendered unconscious, and both inmates' lives were endangered. Many other inmates were evacuated from other parts of cellblock 6. The guards could not perform their duties in the pod until breathing apparatus arrived. The Defendant knowingly created the condition that constituted a grave risk of death to Smith, Mata, and perhaps others.

4. The Defendant procured the commission of the offense by payment, or promise of payment, or anything of pecuniary value.

FINDING: The Court finds that this circumstance does not exist.

5. The Defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

FINDING: The Court finds that this cirsumstance does not exist.

6. The Defendant committed the offense in an especially heinous, cruel, or depraved manner.

FINDING: The Court finds that this circumstance does exist beyond a reasonable doubt.

In making the above determination, this Court followed the logic of the Florida Supreme Court in State v. Dixon, 283 So. 2d 1, 9 (1973), cited with approval by our Arizona Supreme Court on several occasions.

The Defendant Robert Wayne Vickers, after having thrown inflammable liquid upon the physically disabled victim and igniting him and while the victim was attempting to put out the flames, tossed another container of flammable liquid on the victim. Evidence at trial disclosed Holsinger suffered great pain. Buster Holsinger received multiple "sloshes" of burning flammable liquid over most of his body. These contact burns even included the normally protected areas under his arms. According to Fire Marshall David Dale's testimony, this indicated he received part of the attack while standing upright with his arms upraised in an apparent attempt to combat the fire raging around his head. Burns covered virtually all of his body. He died from burns to his bronchial tubes and lungs. Immediately afterward, when asked if Holsinger was dead, Vickers responded "He ought to be. He's on fire." Holsinger was completely helpless. He was a physically handicapped man locked in a cell, he had no way to escape and no defense. Vickers had not been harmed by Holsinger and gained nothing by the crime. Vickers relished the crime, killed a completely helpless individual, and killed senselessly.

7. The Defendant committed the offense while in the custody of the Department of Corrections, a law enforcement agency or county or city jail.

FINDING: The Court finds that this circumstance does exist beyond a reasonable doubt.

The Defendant, Robert Wayne Vickers, at the time the murder was perpetrated was an inmate confined to the Arizona State Prison.

8. & 9. All references in this special verdict to the Arizona Revised Statutes are to the sections of those statutes as they were numbered at the time of the commission of the offenses. Therefore, A.R.S. 13-703 (F) (8) and (9) were not considered.

MITIGATING CIRCUMSTANCES

All information relevant to any mitigating circumstances, including but not limited to those set forth in A.R.S. 13-703 (G), contained in the presentence report, evidence presented at the sentencing hearing, evidence received at the trial, evidence of Defendants psychological history, evidence of Defendants childhood history and testimony and psychiatric reports of the psychiatrist, these were all considered by me.

1. His capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

FINDING: The Court finds that this circumstance does not exist.

The Court finds the evidence presented fails to show by a preponderance of the evidence that Defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired.

The Court heard extensive testimony about Defendant's mental conditions at the trial, at the pretrial competency hearing and at the sentencing hearing. The Defendant sought to prove that some epileptic condition or multiple personality disorder deprived him of his ability to act lawfully. The Court rejects Defendant's "epileptic", also "multiple personality disorder" excuse theory based upon the evidence presented by the State which contradicted the Defendant's evidence.

The Defendant made statements both immediately after the killing of Holsinger and later on, which indicated that he had the presence of mind to formulate a plan to kill, had the mental agility and awareness to carry out the plan at the only time he could be sure that the guards would be away from the cellblock. Evidence as to the Defendant's mental impairment was considered by the Court and the Court finds it is not credible when considered with the evidence as a whole.

2. The Defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

FINDING: The Court finds by a preponderance of the evidence that these circumstances do not exist.

The Defendant presented a history of his childhood background and presented a theory that somehow his abusive and mistreated childhood somehow gave rise to establish duress. The Court has considered the evidence and testimony of Defendant's being mistreated and abused as a child and in addition considered and evaluated the testimony of the psychiatrist and the psychiatric reports on file with the Court, based upon those evidence, they fail to establish a mitigating factor. The mistreatment was so remote in time as to be of little or no weight as mitigation. Any mitigative effect of such mistreatment is far outweighed by Defendant's history of violence and incarceration as an adult.

Defendant presented no other evidence, argument or suggestion that he acted under fear or threat or harm from any source, nor that he was under the control of any other person.

3. Defendant was a principal, under A.R.S. 13-303, in the offense which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

FINDING: The Court finds by preponderance of the evidence this circumstance does not exist.

The testimony and evidence indicated that Defendant acted alone.

4. The Defendant could not reasonably have forseen that his conduct in the course of the commission of the offense for which the Defendant was convicted would cause, or would create a grave risk of causing death to another person.

FINDING: The Court finds by preponderance of the evidence this circumstance does not exist.

Defendant when he set Holsinger on fire and later made statements to witnesses indicating that he had burned the victim and that "He should be dead," "He's on fire," indicated that Defendant intended to kill and forsaw his actions would cause death.

5. The Defendant's age.

The Court finds that the Defendant was 23 years and 11 months of age at the date of the crime and no evidence was presented to indicate that Vickers'age or immaturity contributed to the killing. The Court finds by preponderance of the evidence that this is not a mitigating factor.

THE ADDITIONAL CLAIMED MITIGATING CIRCUMSTANCES AND THE COURT'S FINDINGS THEREON.

None.

DATED this 17th day of April, 1986.

James E. Don

JAMES E. DON
JUDGE OF THE SUPERIOR COURT

cc: Barry A. McNaughton
Assistant Attorney General

Michael J. Brune
Attorney for Defendant

Michael J. Brune
Clemans & Brune
Attorneys at law
P.O. Box 962
1009 E. Florence Blvd.
Casa Grande, Arizona 85222
602/836-2966

Attorney for defendant

SUPERIOR COURT OF ARIZONA, PINAL COUNTY

STATE OF ARIZONA, Plaintiff,	NO. 9934
v.	AFFIDAVIT OF DAVID M. BEAR AND STATEMENTS OF COUNSEL
ROBERT WAYNE VICKERS, Defendant.	

Attached is the affidavit of David M. Bear, M.D., concerning the defendant. Although written for another case in which Mr. Vickers is a defendant, the affidavit is relevant to this case because it concerns the defendant's mental condition. ncluded in Dr. Bear's affidavit are the following statements:

1) "It is my professional opinion that limbic [temporal lobe] epilepsy may substantially impair one's ability to know the nature and quality of acts committed and/or ability to appreciate the wrongfulness of the act." Paragraph 4. Althoughrizona does not recognize the doctrine of diminished responsibility, the doctor's statement shows the relevance of temporal lobe epilepsy to the issues of premeditation and intent to kill. These, of course, are elements are elements of the offense charged or of a lesser included offense which

may merit a jury instruction on the facts of the case. The defendant's mental state is an issue which must be proven by the state beyond reasonable doubt. "[I]t is inconsistent with fundamental justice to prevent a defendant from offering evidence to dispute the charge against him. This, of course, includes any of the elements which comprise the offense." State v. Christensen, 129 Ariz. 32; 629 P.2d 580, 584 (1981).

2) "If a violent or aggressive act occurs during the interictal state [between seizures], as an aspect of the interictal behavior syndrome of temporal lobe epilepsy, it is probable that the patient's ability to appreciate and reflect upon the consequences of his acts is significantly diminished. Furthermore, the presence of limbic epilepsy reduces the likelihood that the patient premeditated a particular act of violence." Paragraph 7.

3) There is a "substantial possibility that Mr. Vickers is suffering from temporal lobe epilepsy..." Paragraph 13.

4) Dr. Bear says that further testing and evaluation of Mr. Vickers is needed, and details the appropriate tests, in paragraphs 16-18.

March 17, 1985 — Michael J. Brown
Attorney for defendant

Copy left at the office of Barry McNaughten on March 18, 1985.

AFFIDAVIT OF DAVID M. BEAR, M.D.

STATE OF MASSACHUSETTS)
) ss.:
County of Suffolk)

I, David M. Bear, M.D. having been first duly sworn state the following:

1. I am a physician in the practice of psychiatry with special training in the area of neurology and psychiatry. I live and practice in Boston, Massachusetts. I am a graduate of Harvard College and the Harvard Medical School, in June, 1971. I completed an internship with specialization in neurology at the Boston City Hospital between July, 1971 and June, 1972. I then became a resident in psychiatry at the Massachusetts General Hospital, and was so employed between July, 1972 and June, 1974. I then became a Clinical Associate of the National Institute of Health, the National Institute of Neurological and Communicative Disease and Stroke, where I began research on the subject of temporal lobe epilepsy and its relationship to emotion and behavior. After two years as an associate of the Public Health Service in Bethesda, Maryland, I returned to the Massachusetts General Hospital as a Dupont Warren Fellow in Psychiatry. Having been a Clinical Fellow in Psychiatry at the Harvard Medical School between 1971 and 1974, 1976 and 1978, I became an Instructor in Psychiatry at the Beth Israel Hospital, Harvard Medical School where my clinical activities and studies centered

on the relationship between brain structure (neurological conditions) and emotional consequences. Currently, I am affiliated with the Massachusetts Mental Health Center, Harvard Medical School, and the New England Deaconess Hospital, where I am an Assistant Professor of Psychiatry (Harvard Medical School). I am also a staff affiliate of the Massachusetts General Hospital and the Beth Israel Hospital, Boston, Massachusetts.

2. With respect to that area of medicine concerning neurological illnesses which have important effects on behavior, I have done extensive research on epilepsy involving the limbic system, most commonly identified as temporal lobe epilepsy. My clinical and research interests center on the interface of Neurology and Psychiatry, an area sometimes termed the "Neurology of Emotion". Other research interests are emotional changes in limbic epilepsy, the control of emotion by the prefrontal granular cortex, the emotional dominance of the right hemisphere, and within forensic psychiatry, the role of neurological conditions on emotion, behavior, and legal responsibility. I have published approximately 30 papers dealing with temporal lobe epilepsy and its relationship to behavior, including aggressive behavior. I have been a lecturer in approximately 10 Continuing Medical Education Courses given by Harvard University, in which I have lectured on behavioral changes produced by temporal lobe epilepsy. I have also lectured on the subject of temporal lobe epilepsy and behavior to the American Academy of Neurology, the American

Psychiatric Association, and the International Neuropsychological Society. I have been a visiting lecturer at Cornell University Medical School, Westchester Psychiatric Hospital (Cornell Medical School), Maine Medical School, and the University of Vermont Medical School; my lectures have centered on the interface of neurology and psychiatry, and traditionally included discussion of temporal lobe epilepsy and behavior. I have received a Sheldon Travelling Fellowship from Harvard University, a Dupont-Warren Fellowship from Harvard University and the Massachusetts General Hospital, and the Sophia Freund Prize from Harvard University. My curriculum vitae and list of publications is attached hereto as Exhibit A. In addition to the publications listed in my curriculum vitae, I have since published the following: Bear, D.M. and Devinsky, O.: "Varieties of Aggressive Behavior in Temporal Lobe Epilepsy," Amer. J. of Psychiatry, Vol. 141, pp. 651-656 (1984); Bear, D.M., Freeman, R., Greenberg, M., "Behavioral Alterations in Patients with Temporal Lobe Epilepsy" in Psychiatric Aspects of Temporal Lobe Epilepsy, D. Blumer, ed., published by American Psychiatric Association Press, Wash., D.C. (1984).

3. I have been qualified as an expert and have testified as an expert in the United States District Court for the District of Columbia and in the State Superior Court of the Commonwealth of Massachusetts. I have been a consultant to the Bridgewater Correctional Facility for the Mentally Insane, where

I have rendered a range of opinions, some favorable to the Commonwealth, others to the defendant.

4. There is a substantial body of medical evidence demonstrating a relationship between temporal lobe or limbic epilepsy and aggressive and violent behavior. Much of this evidence is reviewed in some detail in a paper by Dr. Orrin Devinsky and myself which appeared in the American Journal of Psychiatry in 1984 as well as in my other publications on the subject. Temporal lobe epilepsy does not necessarily manifest itself in the form of generalized convulsions. Frequently, temporal lobe epilepsy presents itself in the form of alterations in behavior. It my professional opinion that limbic epilepsy may substantially impair one's ability to know the nature and quality of acts committed and/or ability to appreciate the wrongfulness of the act.

5. There is medical evidence that patients during the typical "complex partial" seizure may perform brief aggressive acts, and if an appropriate weapon were present during these episodes, significant aggression or death might result. If an act of violence of aggression occurs during such a seizure, it is probable that the patient did not appreciate the quality and nature of the act and its wrongfulness.

6. While aggression during an actual seizure is infrequent, aggression just prior to or following a seizure when much of the brain is in an electrically abnormal state and judgment

and perception are impaired, is more frequent. When committing an act of violence or aggression in such state, it is also probable that the patient does not appreciate the quality and nature of the act and its wrongfulness.

7. The most frequent and severest examples of aggression occur during the interictal state - the period in between epileptic seizures - in patients with longstanding limbic epilepsy. The medical evidence is that even during periods between seizures, repeated electrical discharges into emotion controlling areas of the brain, which can call up such feelings as fear, anger, or sexual desire, eventually lead to a pervasive change in personality and behavior. The result of this neuroelectric effect upon the brain is to produce a characteristic deepening of many emotions, which has been called an "interictal behavior syndrome." A well verified aspect of this syndrome is irritability and aggressiveness, following a pattern in which patients are likely to take the "smallest insults" as very serious matters. If a violent or aggressive act occurs during the interictal state, as an aspect of the interictal behavior syndrome of temporal lobe epilepsy, it is probable that the patients' ability to appreciate and reflect upon the consequences of his acts is significantly diminished. Furthermore, the presence of limbic epilepsy reduces the likelihood that the patient premeditated a particular act of violence. For instance, the interictal deepening of emotions, by increasing background

irritability and raising the possibility of an aggressive act in response to a trivial situation, is likely to cause an individual to behave impulsively, without reflection and contemplation before committing a violent act.

8. At the request of counsel for Mr. Robert Wayne Vickers, I conducted an extensive interview with Mr. Vickers on May 10, 1984 at the Arizona State Prison for approximately five hours. I have also reviewed voluminous legal and medical records concerning Mr. Vickers, including: the opinions rendered by the Arizona state courts; transcripts of the pretrial competency hearing held on January 12, 1979, Grand Jury Proceeding, trial, and post-conviction evidentiary hearing; psychiatric evaluation reports on Mr. Vickers which were rendered in connection with pretrial competency proceedings; accounts by friends and relatives of Mr. Vickers' early life; Mr. Vickers' medical and legal records maintained by the Arizona Department of Corrections, Arizona State Hospital, and the California Youth Authority. I have reviewed with particular care psychiatric and medical records accumulated by the Arizona State Hospital which deal with Mr. Vickers' prior history of epileptic seizures, and including the report of an electroencephalogram (EEG) performed on June 6, 1978. I have also carefully reviewed the statements and testimony of fellow inmates which describe Mr. Vickers' behavior prior to and subsequent to the killing of Mr. Ponciano on October 4, 1978.

9. Based on my knowledge of temporal lobe epilepsy and its emotional consequences, my review of Mr. Vickers' records, and my interview with Mr. Vickers, I believe that there is a substantial possibility that Mr. Vickers' behavior and actions in connection with the killing of Mr. Ponciano were causally related to abnormal electrical activity involving the limbic system, such as occurs in the syndrome of temporal lobe epilepsy.

10. This is suggested by the abnormality observed on the electroencephalogram taken on June 6, 1978, the repeated history of apparent seizures during his youth as recalled by Mr. Vickers and referred to in records maintained by the California Youth Authority and Arizona Department of Correction prior to his incarceration at Arizona State Prison, the fact that Dilantin and Phenobarbital had been prescribed to Mr. Vickers prior to his entering Arizona State Prison, the clear descriptions of abnormalities of Mr. Vickers' sleep with apparent visual and auditory hallucinations and conversations when no other individual was present in his cell, the acts of self-mutilation and attempted suicides by Mr. Vickers both before and during his incarceration at Arizona State Prison, Mr. Vickers' peculiar behavior as reported in records by prison authorities and other inmates during his youth and adulthood, his overreaction and impulsive behavior to trivial episodes, and aspects of his personality and neurological capabilities which I observed during my interview of him.

11. The facts and circumstances of Mr. Vickers' offense do not negate the possibility that the offense was causally related to temporal lobe epilepsy. Contrary to the testimony of Drs. Bendheim and Tuchler at Mr. Vickers' trial, it is possible for one to commit the acts apparently committed by Mr. Vickers during a complex partial seizure or post-seizure state when the patient's perception and judgment are still impaired and when the actor is not able to appreciate the quality and nature or wrongfulness of the act. Furthermore, the acts are entirely consistent with the interictal behavioral state when the patient's ability to appreciate and reflect upon its consequences is significantly diminished. It additionally follows that in view of the relationship between temporal lobe epilepsy and impulsive behavior, the circumstances and nature of Mr. Vickers' offense do not negate or diminish the probability that the act was committed without premeditation.

12. Another pattern of behavioral alteration associated with temporal lobe epilepsy is a syndrome of dissociative states or multiple personalities, in which patients may develop foreign identities or "lose track" of their behavior for a prolonged period of time. There is medical evidence of a significant correlation between temporal lobe epilepsy and dissociative syndromes. Aggression has been reported during such dissociative episodes. It is also well reported that patients with limbic epilepsy may develop paranoid schizophrenia-like psychosis.

Patients in a dissociative state or who suffer from paranoid schizophrenia psychosis may not appreciate the nature and quality or wrongfulness or violent or aggressive acts committed during such episodes. Frequently, where a patient suffers from multiple personalities, he will have no recollection or a distorted recollection of acts performed during a dissociative state.

13. There are aspects of Mr. Vickers' behavior and personality which are consistent with the syndrome of dissociative states or multiple personalties. For instance, in addition to the substantial possibility that Mr. Vickers is suffering from temporal lobe epilepsy which is often associated with multiple personalities, the records indicate that Mr. Vickers used multiple names such as "Bonzai," and that many observers felt he often acted like "two or more" distinctly different personalities. There also appears to be at times a lack of clear awareness or memory for the details of his behavior on October 4, 1978, even after acknowledging to prison authorities and the Grand Jury that he "must have" or "could have" performed the killing. The statements Mr. Vickers allegedly made to Kent Spillman, the prison Psychologist Associate II, shortly after the murder would not have been inconsistent with the syndrome of dissociative states. Often a patient recalls certain events only when he is in a dissociative state. Moreover, patients suffering from multiple personalities may be given to confabulation as described by Dr. Bindelglas in his testimony at trial, wherein

the patient "fills in" gaps in his spotty memory with fabricated details confusing reality with fantasy. Furthermore, Mr. Vickers' bizarre statements and for example his relentless preoccupation, fear, and professed hatred of "all blacks" is consistent with "paranoid schizophrenic form psychosis of epilepsy" seen in some patients.

14. The testimony and opinions of Drs. Bendheim and Tuchler at trial that it was not possible that Mr. Vickers' acts were caused by an epileptic condition failed to take into account the medical literature and evidence discussed above and was not founded upon a sufficient data base. The tests and psychiatric examinations of Mr. Vickers rendered in connection with the Arizona state court proceedings were inadequate to determine whether Mr. Vickers was suffering from temporal lobe epilepsy, and whether his behavior was causally related to a mental or neurological pathology. The electroencephalogram performed on June 6, 1978 was found by a neurologist to be abnormal, illustrating "paroxysmal changes consistent with epilepsy," and a focal abnormality in the left temporal lobe. I have also independently reviewed the electroencephalogram with the assistance of a neurologist in Boston, Dr. Roy Freeman, and concur in this finding. Although these changes are not necessarily diagnostic of epilepsy, they are certainly suggestive of epilepsy and the result undoubtedly warranted further repeated and extended examination, particularly in view of Mr. Vickers' reported history of

seizures and treatment for epilepsy. The fact that a CT scan taken in 1978 did not reveal a structural lesion does not in any way preclude a diagnosis of temporal lobe epilepsy, because in fact the majority of patients with temporal lobe epilepsy have completely normal CT scans. Furthermore, the resolution of CT scan instruments available in 1978 was far below the capabilities of modern machines, which might show small structural lesions not discernible with equipment then available. Furthermore, no formal psychological testing by a qualified clinic psychologist or complete neurological and neuro-psychological test was ever performed. Nor apparently did Drs. Bendheim and Tuchler review Mr. Vickers' complete medical records, including those of his youth.

15. The probability that Mr. Vickers' offense was casually related to temporal lobe epilepsy diminishes the probability that any statement he may have made to prison officials, such as Kent Spillman, shortly after the murder, was voluntary. Although the majority of complex partial seizures are brief, some patients experience prolonged seizures (temporal lobe status epileptius) or prolonged periods of post-ictal (post seizure) confusion. It is possible that Mr. Vickers was experiencing temporal lobe status epileptius or post-ictal confusion at the time of his interview with Kent Spillman on October 4, 1978 after the murder. In such event, Mr. Vickers' control, volition, judgment, and ability to give informed and voluntary consent would have been substantially impaired. The fact that

Mr. Vickers may have been able to give a verbal report to Mr. Spillman regarding his acts and behavior earlier that day does not exclude that possibility that his brain was still in an abnormal electrical state which impaired his volition and ability to give informed consent. Furthermore, as previously discussed, the statements Mr. Vickers allegedly made to Kent Spillman are consistent with the syndrome of dissociative states, a phenomenon which has been associated with temporal lobe epilepsy. When a patient suffers from such syndrome, his alternative personality ordinarily is not able to exercise the same level of control, volition and judgment as the main or central personality. Hence, if Mr. Vickers was experiencing a dissociative episode at the time of the offense and subsequent interview with Mr. Spillman, his ability to give informed and voluntary consent to the interview may have been substantially impaired.

16. It is my professional opinion that further testing and evaluation should have been performed and still needs to be administered before professional judgment can be rendered regarding Mr. Vickers' mental state at the time of the subject offense. Indeed, in view of Mr. Vickers' background, accounts of his behavior, and the abnormal test results which were obtained, I find it professionally unsatisfactory that further neurological, psychiatric and psychological testing were not performed in connection with Mr. Vickers' state court proceedings. It is my professional opinion that in view of the significant likelihood

that Mr. Vickers suffers from temporal lobe epilepsy there is at least reasonable if not substantial doubt as to whether Mr. Vickers understood the nature and quality and wrongfulness of the offense, and that even if he did, whether he premeditated the act committed.

17. Tests to determine whether Mr. Vickers was and is suffering from a pathological condition such as temporal lobe epilepsy should have included and should now include the following: a careful neurological examination by a skilled behavioral neurologist which would include observations of lateral asymmetry, facial asymmetry, abnormalities of emotional expression and specific tests of verbal and visual memory, visual fields, and dichotic listening. Multiple electroencephalogram examinations following prolonged sleep deprivation and performed with specialized leads such as nasopharyngeal or sphenoidal leads (which are more sensitive than scalp leads used in the examination taken in 1978), and a CT scan with the latest generation, highest resolution capability should also be administered. The electroencephalogram must be administered several times because it is well known that a single tracing frequently fails to detect an epileptic focus even in patients with proven epilepsy.

18. If these tests produce positive findings, then further neurologic, psychiatric, and neuropsychological tests should be administered to determine the effect of neurological conditions upon Mr. Vickers' behavior, personality and conduct.

These tests should include: careful neuropsychological testing including quantitative analysis of short term visual memory, short term verbal memory, language function, especially naming ability, and personality testing on inventories sensitive to the "interictal behavior syndrome of temporal lobe epilepsy"; neuropsychiatric examination focusing on symptoms consistent with an interictal behavior syndrome in temporal lobe epilepsy; more specialized EEG testing, including a 24 hour ambulatory EEG, or prolonged telemetry in which there would be careful behavioral monitoring in synchrony with longer observations of brain wave activity. Other specialized EEG testing could include the use of chemical activators to clarify the presence of an epileptic focus. Metabolic scanning utilizing the technic of positron tomography may also assist in the diagnosis of temporal lobe epilepsy.

19. The matters stated herein are of my own personal knowledge or are matters which are customarily and reasonably relied upon by psychiatrists. I am qualified to render the

opinions contained herein, and, if called to do so, I would and could testify as to the same.

Respectfully submitted,

David M. Bear, M.D.

Suffolk, ss. The Commonwealth of Massachusetts

Sworn to me by David M. Bear, M.D., on this 21st day of June, 1984.

Notary Public

My Commission Expires: 15

PAUL M. BINDELGLAS, M.D., LTD.
CAMELBACK PROFESSIONAL BLDG.
5051 NORTH 34TH ST.
PHOENIX, ARIZONA 85018
TEL. 956-2080

'85 MAR 18 A 9:22
DEPUTY

March 12, 1985

Honorable James E. Don
Judge, Superior Court
Pinal County
State of Arizona
Florence, Arizona

RE: ROBERT WAYNE VICKERS
Case No. 9934

Dear Judge Don:

At your request, I saw Robert Wayne Vickers for psychiatric evaluation under Rule 11 at Cell Block C. at the Arizona State Prison at Florence on January 29, 1985.

I spent approximately three hours with Mr. Vickers. In addition, I reviewed the reports of the alleged offense sent to me by William J. Shafer, III, Attorney General for the State of Arizona, plus his previous history and medical records that have been supplied to me by his attorneys. These included the following: reports from prison, youth homes, early psychological reports, plus the reports of his treatment and functioning under the California Youth Authority.

Mr. Vickers was interviewed privately in a small room. His legs and arms were shackled. Mr. Vickers recognized this examiner as having interviewed him on two other occasions. He did not remember seeing this examine. during the court hearing in 1983. Mr. Vicker's affect seemed a little flat, but he was coherent and relevant in his speech and appeared cooperative. Because of the blunting of affect, he was asked about medications, and he stated he was receiving two medications, Norgesic, for headaches, and the other he doesn't know. In review of his medical records, I found that the second medication was Anaprox, also for headaches.

In response to question, Mr. Vickers states that he has headaches two to three times a week. He doesn't remember how long he has had them, but it has been a long time. He also describes episodes of behavior which he doesn't remember taking place. Thus, he described remembering that it was Saturday and that he was looking forward to a visit from his aunt on the next day, Sunday, however, the next thing he remembers is that it is Wednesday. He asked the guard who

DOCKETED
BY _____

told him he visited with his aunt on Sunday, but Mr. Vickers doesn't remember it.

Other examples he gives are that his radio is left on and there is nobody in his cell who could have turned it on, but he doesn't remember touching it. Also, his books are found in different places, and he doesn't remember moving them. His cigarettes will be all gone, and he doesn't remember smoking the last one, and no one has been in his cell but him.

Mr. Vickers dates the onset of these memory problems to when he first arrived at the prison. He states he is in a cell by himself and they have put a screen on the bars. No one comes into his cell. The food is slid in and the empty trays are slid out through an opening. He has been getting occasional visits from several aunts. They also write. He also gets an occasional letter from his sister and father, but rarely from his mother. He has received one recent letter from his youngest brother.

In going into his background, he tells of his moving from foster home to foster home at least eight or nine times, each with a different value system. Thus, he tells of one foster home where the woman played with his penis and apparently enjoyed some sex play with him. When he was moved to another foster home and the woman appeared rather glum, he put his hand in her blouse, and she turned red and slapped his face. He does describe some foster homes that were nice, but at those times, his fathe would want him, and he wanted to live with the family. His father, he states, was very messed up, was living with an eighteen year-old girl who wanted him to call her mother, and it just didn't work out. He would frequently run away from placements and feed himself by committing burglaries.

In regard to his general health, except for headaches and mental symptoms, his health is good. He remembers an auto accident at the age of eight or nine, at which time he received a laceration over his right eye. He doesn't remember the severe accident reported in his California file that resulted in being paralyzed for a few days, and which apparently activated seizures. He also

doesn't remember the severe backaches he used to have that are documented in the prison medical records.

In going into the subject of his headaches, he stated that they put him into a bad mood and then he often thinks the guards are playing games with him. He stated he feels his"brains are going to shoot out of his ears". Noise bothers him at that time. At other times, or associated with the headaches, his mind is spinning and he can't stay on a subject, he can't write, and can't think of what to say. He minds feels blank at such times, and he is easily annoyed and may be pacing.

He states that sometimes he has trouble sleeping. Almost every night, he has the most severe nightmares. These usually involve dreams of people trying to beat him, harm him or kill him. He used to wake up frightened and have trouble falling asleep again. Now he can sleep through the night, he stated, because the bullets may go through him, but they don't hurt him. Or, the people may stab him ten times and not hurt him, but he turns on his attackers, goes after them with an ax, chops their heads off, slams the heads forty times into a trash can or puts the heads in a microwave oven, watches them swell up and then he wakes up. He states that in the dream, he enjoys it, but in the daytime he feels he is"sick in the head to enjoy that kind of stuff."

Sometimes when he is afraid some one might be wanting to hurt him, he has a dream of them hurting him and he hurting them in return. At other times, when he h s hurt someone, he can't tell if what he remembers is a dream, since he has that type of dream every night, or whether he actually has hurt someone.

In regard to his cutting himself, he states that it has occurred for three different reasons: sometimes he has wanted to die, other times he's just wanted to get attention, and at other time, he hasn't remembered doing it.

With regard to the area of paranoid ideation, at times he has felt that people are out to get him. At other times he has felt there is a camera in the television set, watching him. He also feels at times people are talking to him on TV. On religious shows he feels they are preaching just to him alone. At times he hears people talking about him. It used

to get him mad, but now he just turns up his stereo, he states. At times,he used to hear the name,"Robert" called, but now he often hears the name, "Bonzai" called. Sometimes he feels he has a woman watching him and calling his name to keep him company.

With regard to visual hallucinations, he does mention his "alligator", but tends to minimize it. At other times, he has smelled what seems like a dead cat or rat, or smells like the exterminator was there. There are times, he states, when he has a strange taste in him mouth and his body feels numb. When asked if he ever had the sensation of having experienced something before,(this is clinically called Deja Vu), he stated that he remembers dreaming of climbing a mountain and both the mountain and the climbing seemed very familiar. He feels he must have been a mountain climber in a previous life. He has had numerous similar experiences.

In doing simple tests of a neuropsychological basis, Mr Vickers was asked to repeat the words, "TOP,POP,POT", it took him three tries in order to say it correctly. He was also very poor at being able to give the meaning of proverbs.

With regard to his initial desire to be executed, he stated that he saw executions as a "parole", but when his sister came to see him and cried, he felt he couldn't stand to see her unhappy and so, changed his mind. He has felt the closest to his sister and to his grandmother. When his grandmother died, there was a dove near him in the prison yard, and he felt it was sent by his grandmother to say goodbye.

When questioned as to what happened with Holsinger, he stated that he was getting Vitalis in order to get pure alcohol for drinking. By evaporationg the alcohol and condensing it on a cold mirror, one could get the pure alcohol. He then expressed his general disdain for Holsinger whom he said wanted to have some doctor killed,and instead had killed his eighty-year-old housekeeper. Mr. Vickers remembered showing pictures he had just received of his ten-year-old niece, and Holsinger made a dirty sexual remark about her. He stated he became furious and stated the next thing he remembers is that he was in the same room as he was now, and they were reading him his rights.

He stated the same thing happened in the court room when he threw the pitcher at the district attorney. He had a bad headache that day, felt his mind spinning and didn't feel good. Then he remembers him asking his mother questions as if

she were a streetwalker so he got mad, and the next thing he remembers is that he is not in the court room, but the jury room.

I asked him about the effects of the various medications. Sinaquan, the anti-depressant, made him drowsy, and made his mind go blank, he stated.Thorazine, the anti-psychotic, gives him a hangover the next day. Dilantin, the anti-convulsant made him feel"regular" without feeling sedated. Mr. Vickers is aware that the EEG in 1978 showed something irregular in his left temporable lobe.

When asked how he felt coming to prison, he states that when he left the California Youth Authority, he thought of being a counselor. When he arrived at the prison, he felt he had to act real tough or he would be hurt. He states he had a bad attitude, that every day he felt strange and his mind was messed up. He thought that he would be better off dead.

When asked how he felt now, he stated that he felt pretty good, but that every ten minutes or so, he gets confused and numb for a second. At such a time, he does not register what others are saying to him. He states that this happens alot.

When asked if he thought he was sane, he answered "most of the time", and that he knows the difference between right and wrong. However, sometimes he gets "carried away". When he is not "the good Robert", he is mad, suspicious, paranoid and always has a reason for what he does as he doesn't want to admit his mind is messed up.

When asked about "Bonzai", he stated he is always"snapping"and has evil thoughts. When he is that way, and his aunt visits, he states he is quiet because that kind of talk bothers her.

When asked what would be different if he were "Bonzai" now, he stated he would get up and hit me. When I asked why, he stated," for not minding your own business."

When asked what he would want to happen in his case, he stated he would like to be proven sane, but also would like to go to a "nut house" to find out why he has such severe headaches and such bad dreams.

DISCUSSION: In reviewing his records, the following is a brief summary.

Mr. Vickers had two substance-abusing parents who were divorced. Neither could care for the children. From age four, he was in various foster homes. His sister reports much physical abuse. She was sexually molested and from Mr. Vicker's history, so was he. There is a history of a car accident at age eight or nine, and also a history from C.Y.A. of another accident that precipitated seizures.

Mr. Vickers was in many residential and institutional settings,and often exhibited delinquent behavior. He was examined by Dr. Frank Enos, a psychologist, twice at the age of thirteen. Dr. Enos thought that he was paranoid, had some neurological signs and has reported that Mr. Vickers was apprehensive about being seen as "crazy". Psychiatrists felt he needed long term help. In the California Youth Authority, however, when he was placed on anti-convulsive and anti-psychotic medication, he was considered a"model young man".

When transferred to Maricopa County Jail, after six weeks, he was taken off his anti-convulsive medication by a non-physician. Within six weeks, he started self-destructive and self-mutilating behavior, and after six months, episodes of violence. Mr. Vickers consistently complained of headaches. However, the physicians at the prison refused to put him back on Dilantin because he didn't have convulsions. Convulsive seizures are not the only kind of epileptic seizures. "Psychic seizures" come from the temporal lobe. It should be noted that Mr. Vickers never gave a history of violence prior to prison and the violence started only after the designated prison authorities took him off the Dilantin. I believe all his subsequent violence and difficulties may be due to this.

He was sent on two occasions to the Arizona State Hospital for observation. They did an electroencephalogram in the waking state. Although such a waking EEG is inadequate, nevertheless, a left temporal lobe focus was seen. On both occasions, Mr. Vickers spent his entire time in the State Hospital in 4-Point leather restraints: that is, his limbs were tied to the four corners of the bed, with a leather sheet over him. This was done even though he exhibited no overt violence there, but they were fearful of possible violence. Little psychiatric observation is possible under those conditions, and no neuropsychological testing was done.

It is my opinion, however, that Mr. Vickers has definite dissociative reactions. In my opinion these are due to either complex partial seizures from the temporal lobe, a multiple personality, ("Bonzai" or Robert), or both.

It is my opinion that the reasons for considering the possibility of temporal lobe seizures are the following:

1.) A history of cerebral trauma on at least two occasions.

2.) A history of some seizures in the reports from California.

3.) Neurological deficits reported on the psychological reports done by Dr. Frank Enos, the psychologist, when Mr. Vickers was thirteen.

4.) Improvement in his condition when placed on anti-convulsive and psychotropic medications in California.

5.) A development of symptoms occurring after being taken off the medication. The symptoms which developed were: headaches, episodic depression, paranoid ideation and aggression, episodes of hallucinations: auditory (hearing voices), visual(seeing the alligator), olfactory(smelling unpleasant odors), gustatory(experiencing strange tastes in the mouth), and sensory(numbness of various parts of the body), "Deja Vu, episodes of mental confusion and black-outs for periods ot time, self-mutilation, suicidal attempts, and homicidal violence.

6.) An abnormal EEG in the waking state. Such an EEG recording is inadequate in order to make the diagnosis.

7.) Hypergraphia - that it, excessive writing. Mr. Vickers has been writing numerous, often long and detailed, letter to many people.

It should be mentioned that although the behavioral aspects of temporal lobe epilepsy is within the field of psychiatry, the diagnosis of epilepsy of any kind and its treatment, is a neurological diagnosis. The only neurologist to have any contact with Mr. Vickers was Dr. Richard Thompson in 1978, when he read the EEG as abnormal.

The case for multiple personality is as follows: First a definition: Multiple Personality is the existence within the individual of two or more distinct personalities, each of which is dominent at a particular time. Each personality

has it's own unique memories and behavior patterns. The degree of awareness which the various personalities have of each other can vary. They may be cognizant of each other, amnestic, or amnestic one direction only, in that one personality knows of the other, but not visa versa. At least one personality is hostile and aggressive, and may be suicidal or homicidal.

The characteristics of multiple personality which have been reported are as follows:

1.) A history of time loss, blackouts, and behavioral episodes that are not remembered.

2.) Severe headaches, depression, suicidal attempts, being unable to control thoughts, mental confusion.

3.) Changes in the patient's behavior during which time he may call himself by another name.

4.) Also, associated are dazed state, nightmares, rapid mood shifts, sexual abuse in childhood, as well as physical abuse.

5.) Auditory and visual hallucinations and body anesthesia.

The above picture fits Vickers very well. As just mentioned, there are very strong grounds to suspect either or both diagnoses which, since they are both dissociative states, may co-exist with each other.

In addition, there is paranoia which causes him to feel threatened and this paranoia is episodically more intense. Episodically, he is also depressed.

Therefore, in answer to Question No. 1, relative to competency to stand trial, it is my opinion that <u>at this time</u>, Mr. Vickers does have intermittent paranoid ideation and at other times, depression. However, he is coherent and relevant, and has a decent relationship with his attorney. At this moment, Mr. Vickers would be considered competent to stand trial, however, as I have already stated, it is my opinion that Mr. Vickers has definite dissociative reactions. Also, he would have a greater chance of dissociating under stress, therefore, the chances are very great that he would dissociate during the trial, and consequently at such times, would not be able to follow the proceedings, aid his attorney, or present a favorable image to the jury.

2.) In response to the question of his mental condition at the time of the offense involving Mr. Holsinger, the record from the Attorney General's office would indicate that it was a non-planned, spur-of-the-moment, impulsive act. At that time, he had extreme, excessive anger which contributed to a dissociative reaction as mentioned above. In a dissociative state, he is incapable of rendering any judgement and is unable to know right from wrong.

However, in order to make a definitive diagnosis, sustained observation in a neuropsychiatric setting is necessary. In such a setting, Mr. Vicker's could be continuously observed, a sleeping electroencephalogram, and other sophisticated neurological tests would be performed, neuropsychological testing could be done and there would be a staff who would be familiar with the conditions under diagnostic consideration.

The prison staff had sent Mr. Vickers to the Arizona State Hospital on two occasions. Unfortunately, he was kept in seclusion, in 4-Point restraints and covered with a leather sheet the whole time. No adequate workup or testing occurred.

It is my opinion that the implications of a change in diagnosis are so great that the medical staff there is emotionally committed to their previous diagnosis, therefore remand to the state hospital would be a waste of time. It is my suggestion that if at all possible, Mr. Vickers be sent to a California hospital for the criminally insane to have a complete diagnostic workup, as I outlined above. I feel that a thorough neuropsychiatric study of Mr. Vickers is long overdue.

If there is there is anything further needed relative to this case, I trust that you will be contacting me.

Sincerely yours,

Paul M. Bindelglas, M.D.

PMB/nr

AFFIDAVIT

COMMONWEALTH OF MASSACHUSETTS)
)
County of Middlesex)

I, Michael Nelson M.D., being first duly sworn, depose and say:

1. My name is Michael Nelson M.D. I am a Board-certified psychiatrist, practicing in Massachusetts. I am Chief of Psychiatry at Lowell General Hospital and at Burbank Hospital in Fitchburg Massachusetts. I taught clinical psychiatry at Harvard University Medical School from 1966 to 1980. I was graduated from the Royal College of Physicians in Edinburgh Scotland in 1959, trained in neurology and neuro-surgery at the Institute of Psychiatry at Maudsley Hospital, London, and at Churchill Hospital, Oxford, England. I was a resident in psychiatry at Massachusetts General Hospital in Boston and did intensive studies in aggressive behavior under Dr. Frank Ervin there. My specialty is brain-behavior interaction, including impulsive behavior and aggression.

2. I have not personally examined and have not met Robert Wayne Vickers. I have, however, examined material relating to Robert Vickers' family and personal history. I have studied elements of the record of his history of delinquency and criminal conduct. I have reviewed elements of the psychiatric evaluations done by various psychiatrists in connection with his several trials. I have examined elements of affidavits and other statements made about Robert Vickers by numerous close relatives, pertaining to Mr. Vickers' history and mental condition. I have reviewed letters written by Mr. Vickers from prison to members of his family and I have discussed Mr. Vickers' mental condition with one of the psychiatrists who has examined him on several occasions in connection with his criminal trials.

3. Robert Vickers' history clearly appears to be one of radical emotional deprivation from his earliest childhood on, and of physical and psychic abuse in

EXHIBIT 4

his formative years. There is significant evidence, in addition, of a temporal lobe disorder, possibly stemming from a lesion, that affects his thinking, feeling and behavior. The abnormal encephalographic record, however fragmentary and insufficient it is, tends to support this diagnostic hypothesis. The history of epileptic seizures lends additional support. His mental condition may well be further adversely affected by the use of psychomimetic drugs, such as LSD and amphetamines, as well as by his long-time reliance on and then sudden deprivation of medication to control his epileptic seizures. There is strong reason to suspect a syndrome of episodic discontrol, produced by even relatively trivial emotional stress, a behavior pattern scientifically examined in recent time by authorities such as Dr. Russell Monroe and Professor John Lion of Johns Hopkins University. Vickers himself has spoken of his occasional experiences of paranoia, especially in the aftermath of the misuse of LSD and amphetamines, and of episodes during which he was reportedly unaware of his actions. There is sufficient evidence for a pattern of hyposexuality, of self-mutilation, and of aggressive and assaultive conduct, arising from a combination of personality disorder, organic brain syndrome, and episodic discontrol.

4. Robert Vickers' capacity to make rational judgements and competently to make significant decisions about his own life and death cannot be properly assessed in the absence of a full medical, psychological, and psychiatric work-up on him, a process that can only be accomplished over a three to four week period. An hour's conversation with him may very likely not reveal the true state of his psychic make-up and his mental competence, even to a trained and qualified psychiatrist. In addition, the psychiatric evaluations to date have not had the facilities or time for such an evaluation. It is my professional judgement, based on the information which has been provided to me , that no determination of his mental competence is possible without a three to four week evaluation in appropriate physical surroundings that would include:

- psychodynamic evaluation and counselling;
- a thorough neurological evaluation;
- repeated CAT scans;
- a CSF (cerebral-spinal fluid) examination;
- repeated, all-night sleep electroencephalograms, preceded by sleep deprivation;
- neuro-psychological testing to determine organicity;
- careful personality testing;
- special psychiatric examination to determine whether over an extended period of time there are episodic changes in mood, cognition, and sexuality.

5. In my professional judgement, Robert Vickers is episodically psychotic and incompetent, and especially under stress his competency may be severely impaired. I believe that underlying his self-defeating behavior with regard to the waiver of his legal remedies is a self-destructive impulse which he means to accomplish through the instrumentality of the State's gas chamber. Absent the kind of psychiatric evaluation that I have described, no conclusion should be made about the present competency of Robert Vickers.

Signed under the pains and penalties of perjury this 6th day of March 1983.

Michael Nelson

Michael Nelson M.D.

Signed and sworn to before me
this 6th day of March 1983.

Notary Public

My commission expires:
7.2 1987

A F F I D A V I T

STATE OF ARIZONA)
) ss.:
County of Pima)

I, JOSE M. SANTIAGO, M.D., having been first duly sworn, state the following:

1. I am Jose M. Santiago, M.D. I live and practice in Tucson, Pima County, Arizona. I am a physician in the practice of psychiatry. I am a Diplomate of the American Board of Psychiatry and Neurology. I received my M.D. degree from Boston University Medical School, did a combined internship and residency in psychiatry at Boston University Hospital and completed my psychiatric residence at the University of Arizona Health Sciences Center. I am Assistant Professor in the Department of Psychiatry of the University of Arizona Medical School. I am Chairman of the Department of Psychiatry for Pima County and was Chief of Staff of Kino Community Hospital for five years. I am a Consultant to the Pima County Superior Court in matters of competency to stand trial and M'Naughton Rule evaluations. I have extensive experience, including scores of cases, with forensic psychiatric evaluations for incompetence and insanity also for the U.S. District Court for the District of Arizona. My clinical and research specialty is the evaluation, diagnosis, and therapy of gross psychopathology.

2. I shall not offer any conclusive opinion about the mental condition of Robert Wayne Vickers, since I do not know him and have performed no examination or clinical tests upon him. I have, however, reviewed court opinions and the transcript of a competency hearing held in open court concerning Mr. Vickers. I have studied some eight or ten psychiatric evaluation reports on Mr. Vickers that have been submitted to the Arizona courts by various psychiatrists. I have read a number of letters that Mr. Vickers has written in the past four years from prison to members of his family. I have read accounts of his life and behavior pattern written by his close relatives. And I am reasonably familiar with the elements of the history of his criminal conduct, both before his incarceration in the Arizona State Prison and since that time. I am professionally confident that I have enough information to draw the inferences that follow.

3. From the records available, the following observations can be made:

A. The psychiatric reports did not reflect any direct access to past history and records on Mr. Robert Wayne Vickers' psychiatric, neurological or medical conditions. The lack of such records is very significant since there is evidence in the available transcripts of positive findings in the neurological and medical status of Mr. Robert Wayne Vickers. These findings could, if substantiated, lead to the diagnosis of a mental disorder in Mr. Robert Wayne Vickers which would have significant impact on his ability to make rational decisions.

EXHIBIT 3

B. There is a history of epilepsy and, especially, of a diagnosis of complex partial seizures (also known as temporal lobe epilepsy). This is substantiated by several abnormal electroencephalograms, a diagnosis several years ago in California of this condition, and the initiation of anti-seizure medication (Dilantin). The absence of documented seizures in Mr. Robert Wayne Vickers can be found in several records and can be misleading since in complex partial seizures the large body of evidence is that in most cases the seizure activity is manifested behaviorally rather than through typical convulsions. The latter being more representative of other forms of seizure disorders. The current literature shows that the behavior attributed to complex partial seizures can be elaborate and can include an interference with his sensorium on an ongoing or intermittent basis so that his ability to think clearly and make decisions not based on impaired emotional and cognitive areas is gravely disturbed. A thorough evaluation in this area by specialists with a great deal of knowledge in this field would therefore be crucial before any conclusions could be made about his current thinking patterns.

C. There is no evidence in the records reviewed of reports of examinations on endocrine or other medical conditions. Specific tests are required to determine this area and clinical presentation of the patient is insufficient to come to a diagnosis which is consistent with the current state of the art. Such clinical tests could possibly reveal a biologically based disturbance which would again impair temperament and lead to self-destructive behavior.

D. The diagnosis of an anti-social personality disorder is complex and requires the elimination of other potential diagnoses, such as conduct disorder, adult anti-social behavior, schizophrenia, and manic episodes. (See the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association 1980.) Psychological testing and prolonged observation over time are necessary. Data pertaining to this process is not reflected in the records available to me. A firm conclusion as to the presence or absence of any of the other diagnoses can be therefore impaired if such procedures have not been followed. Where a decision that involves a potential self-destructive act is in question, this supporting evidence for the exclusion or inclusion of a mental disorder is most desirable. From the records available through the family and his own letters, the diagnostic question remains very much open to further investigation in my opinion based on the current written data.

E. I therefore suggest that the evidence available to me indicates the need for a prolonged full psychological and psychiatric examination to ascertain the presence or absence of a mental disorder such as would throw light on Mr. Vickers' competence and rationality. The full battery of psychological tests is essential as are complete medical, neurological and psychiatric examinations. A complete set of records of his medical and psychiatric encounters of the past should be gathered. Proper laboratory tests interpreted by certified experts are invaluable.

F. It is my professional opinion based on the information and data I have examined that there is reasonable medical evidence to suggest that Mr. Vickers could be suffering from a mental disorder that would interfere with his ability to make sensible decisions about himself, very possibly arising from an organic condition that affects his ability to think. Only the procedure outlined above can establish whether that suspicion is valid. Absent such a thorough examination, no reliable judgement can now be formed on Mr. Vickers' mental competence.

Respectfully submitted,

JOSE M. SANTIAGO, M.D.

Sworn to me by Jose M. Santiago, M.D., on this 8th day of March, 1983.

Notary Public

My commission expires: 3-9-86

...NGS HAUGHT
...PERIOR COURT
85 JUL 9 PM 2 23
DEP

NEUROLOGICAL ASSOCIATES OF TUCSON

...ucson Medical Park — Building B — Suite
5402 East Grant Road, Tucson, Arizona 85712

Telephone 795-7750

NEUROLOGICAL SURGERY
Thomas F. Norton, M.D.
Joseph C. Mirabile, M.D.
Wm. Paul Diefenbach, M.D.

NEUROLOGY
Harvey W. Buchsbaum, M.D.
William S. Masland, M.D.
Francisco R. Valdivia, M.D.
Robert A. Foose, M.D.
Michael S. Smith, M.D.

July 1, 1985

The Honorable James E. Don
Presiding Judge - Division Three
Pinal County Superior Court
Pinal County Courthouse
Florence, Arizona 85232

Re: Robert Wayne Vickers

Dear Judge Don:

I have written concerning Robert Wayne Vickers. I have reviewed a variety of medical records, discussed his behavior and conditions with a number of the staff at the hospital, and also interviewed Mr. Vickers personally.

In short, he has been under intense scrutiny, including that of trained medical personnel, for a number of years. Historically, there is absolutely nothing to suggest that this man is epileptic. The intensity of the observational data is so high, that further diagnostic testing, such as electroencephalography, would be totally superfluous.

Sincerely,

William Masland, M.D.

WM/dms

DOCKETED
BY

Declaration of Vernon H. Mark, M.D.

I, Vernon H. Mark, M.D. hereby declare that:

1. I am a physician in the practice of neurology. My curriculum vitae is attached hereto as Exhibit A.

2. Attached hereto as Exhibit B is a true and correct copy of a letter I wrote to Edward M. Chen, Esq., counsel for Robert Wayne Vickers in Vickers v. Ricketts, et al., CIV-83-2027-PHX-WPC. The observations and opinions which are stated therein is based upon my review of various medical and correctional records pertaining to Mr. Vickers, including the electroencephalogram taken on June 6, 1978, records from the California Youth Authority and Arizona Department of Corrections, reports of Drs. Paul M. Bindelglas, Maier Tuchler, and William Masland to Judge Don, and affidavits of Drs. Paul M. Bindelglas, and David M. Bear.

3. The matters stated in my letter to Mr. Chen are of my own personal knowledge or are matters which are customarily and reasonably relied upon by neurologists. I am qualified to render the opinions contained therein, and, if called to do so, I would and could testify as to the same.

EXHIBIT K

I declare under penalty of perjury under the laws of the State of Arizona and Commonwealth of Massachusetts that the foregoing is true and correct.

Executed this 26 day of July, 1985, in Brookline, Massachusetts.

Vernon H. Mark, M.D.

HARVARD MEDICAL SCHOOL
DEPARTMENT OF SURGERY

Please reply to

NEUROSURGICAL SERVICE

NEUROSURGICAL SERVICE
BOSTON CITY HOSPITAL
818 HARRISON AVENUE
BOSTON, MASSACHUSETTS 02118
(617) 262-9570

July 25, 1985

Mr. Edward M. Chen
Coblentz, Cahen, McCabe and Breyer
1 Embarcadero Ctr.
35th Floor
San Francisco, CA

Re: Wayne Vickers

Dear Mr. Chen,

I have reviewed the extensive record that you sent me on R. Wayne Vickers including the EEG information. I have the following comments regarding this man's present situation.

There is a possibility that this man's abnormal behavior may be related to a physical or functional abnormality of the brain. This possibility is strong enough so that the following tests should be accomplished on modern equipment.

1). A CT scan in the transaxial plane and a 5 mm. scan in the coronal plane using a third or fourth generation scanner.
2). Neuropsychological testing including the Boston VA Battery.
3). EEG studies during sleep and employing nasopharyngeal leads.
4). A thorough neurological evaluation including mental status under conditions in which the patient can be adequately tested.

This is simply a preliminary set of examinations which should be administered to any patient with unexplained abnormal behavior. Furthermore, an attempt should be made to assess the birth records, early medical records and the reason for his having received Dilantin. Observations by impartial observers are important and they should be included as part of the history in his record. Example: Did this man have a significant head injury on March 10, 1977 when he fractured his spine in an automobile accident? Was any attempt made to evaluate his brain? He certainly injured his spinal cord at that time and was paralyzed for a few days. This man's record is obviously incomplete and should be brought up to minimal standards for neurobehavioral evaluation. It fails that test at the present time.

Sincerely,

Vernon H. Mark, M.D.
Director, Neurosurgery

Declaration of Donald L. Schomer, M.D.

I, Donald L. Schomer, M.D. hereby declare that:

1. I am a physician in the practice of neurology. My curriculum vitae is attached hereto as Exhibit A.

2. Attached hereto as Exhibit B is a true and correct copy of a letter I wrote to Edward M. Chen, Esq., counsel for Robert Wayne Vickers in Vickers v. Ricketts, et al., CIV-83-2027-PHX-WPC. The observations and opinions which are stated therein is based upon my review of various medical and correctional records pertaining to Mr. Vickers, including the electroencephalogram taken on June 6, 1978, records from the California Youth Authority and Arizona Department of Corrections, reports of Drs. Paul M. Bindelglas, Maier Tuchler, and William Masland to Judge Don, and affidavits of Drs. Paul M. Bindelglas, and David M. Bear.

3. The matters stated in my letter to Mr. Chen are of my own personal knowledge or are matters which are customarily and reasonably relied upon by neurologists. I am qualified to render the opinions contained therein, and, if called to do so, I would and could testify as to the same.

EXHIBIT J

I declare under penalty of perjury under the laws of the State of Arizona and Commonwealth of Massachusetts that the foregoing is true and correct.

Executed this 26 day of July, 1985, in Boston, Massachusetts.

Donald L. Schomer, M.D.

Beth Israel Hospital

330 Brookline Avenue
Boston, MA 02215

(617) 735-2000

A major teaching hospital of Harvard Medical School

A constituent agency of Combined Jewish Philanthropies

Mitchell T. Rabkin, MD
President

July 26, 1985

Edward M. Chen
Cobentz, Cahen, McCabe & Brever
35th Floor
1 Embarcadero Center
San Francisco, CA 94111

Dear Mr. Chen:

I am responding to a letter you forwarded to me on July 20, 1985 regarding your legal case in the defense of Mr. Robert Wayne Vickers. I have read the material you have forwarded to me which includes an electroencephalogram labeled EEG 8054, dated 6/6/78. In addition, I have read a packet entitled Incident Report dated 7/7/78, to Harold J. Cardwell, Superintendent; an affadavit from Paul M. Bindleglass, MD, dated January 3, 1985; an affadavit from David M. Bear, MD, dated October 31, 1984; a letter from Dr. Paul M. Bindleglass to Judge James E. Don, dated March 12, 1985; a letter and file from Patricia A. Haven, Supervisor, to Mr. Richard H. Abramson, dated October 31, 1983; and a letter from Maver A. Tuchler, MD to Judge James E. Don dated January 24, 1985. I have formulated an opinion regarding the diagnostic possibilities that exist for Mr. Robert Wayne Vickers. In addition, there was one brief note from William Maslan, MD to Judge Don, dated July 1, 1985, which was reviewed but the reports on which that letter must have been based were not available for review.

It is my expressed medical opinion that a diagnosis of complex partial epilepsy remains a distinct probability. Specifically, I would like to comment on the fact that the electroencephalogram performed in 1978 revealed occasional bursts of paroxysmal (suddenly appearing) frontal predominant rhythmic theta (4-7 Hz) electrical activity. That is a nonspecific sign but is compatible with head injuries, migrainous headaches, or may be an electrical marker for secondarily generalized epilepsy. Perhaps, however, the most striking finding on this EEG is the presence of intermittent delta (less than 4 Hz) and theta frequency slowing over both posterior lateral temporal lobe regions. That type of finding suggests that there has been some compromise of a

structural or vascular nature to the brain in those regions. These findings also, while nonspecific, may be markers for a structural abnormality which in turn may very well have epileptic features. The patient/client was not symptomatic at the time and, therefore, the likelihood of finding sustained epileptic activity is less than had the tracing been done when the patient was having symptoms. This type of tracing certainly would require further neurological investigations to help determine possible abnormalities. Such studies would include, as mentioned by Dr. David Bear, a computerized tomographic scan of the brain. I realize that such a scan was performed in 1978 and interpreted as normal, but I have not had a chance to review it specifically. I would also agree with Dr. Bear's observation that scanning technology has improved dramatically since 1978 and, even though the scan was interpreted as normal in 1978, repeat testing with more sophisticated scanners certainly is indicated. In addition, other extremely sophisticated radiologic techniques such as positron emission tomography or nuclear magnetic resonance scanning are indicated. If such procedures are not available; more routine type of studies such as radiologic evaluation of the blood vessels to the brain (cerebral angiography) or evaluation of the spinal fluid through a lumbar puncture are justificable and are diagnostically relevant procedures. In addition, further electroencephalograms with sleep deprivation or with the use of specialized electrodes such as sphenoidals, minisphenoidals, or nasopharyngeal electrodes are justifiable. If it can be shown that Mr. Vickers has an epileptic disorder, certainly a case could be made that some of the violent behavior he has exhibited may in some way be related to that epileptic condition. The ways in which that violent behavior can be correlated to his convulsive disorder, in my opinion, certainly deserved to be heard by a judge and/or jury. The mechanisms of this relationship have been well documented in the medical/neurological literature.

Certainly, other diagnostic possibilities exist as outlined by several observers in this case, including psychiatric disorders. Basically, however, I would have to take an exceptionally strong and opposite view to the view of Dr. Maslan regarding his statements in the July 1, 1985 letter to Judge Don. In that note, he says that historically there is absolutely nothing to

suggest this man is epileptic. However, it seems that historically there were many very compelling statements that this man had overt seizures, documented by reasonable observation. In addition, he had a therapeutic response to an anticonvulsant, which is somewhat nonspecific but nonetheless more compelling than alluded to in Dr. Maslan's letter. Diagnostic testing is in no way superfluous to the case being made for Mr. Robert Wayne Vickers.

I do not wish for you to conclude from my readings of the records that I feel Mr. Vickers has an epileptic condition, but rather than he has a reasonable likelihood that epilepsy is a major diagnostic possibility and therefore would need associated studies. If there is further compelling information resulting from further studies which concludes that Mr. Vickers, in fact, is suffering from complex partial epilepsy, then a case certainly can be made to relate his behavior to his convulsive disorder.

I have forwarded with this letter a copy of my curriculum vitae as of June 21, 1985.

Sincerely,

Donald L. Schomer, MD
Director
Clinical Neurophysiology
Department of Neurology

AFFIDAVIT OF DAVID M. BEAR, M.D.

STATE OF MASSACHUSETTS)
) ss.:
County of Suffolk)

I, David M. Bear, M.D., having been first duly sworn state the following:

1. I have reviewed Dr. William Masland's letter to the Honorable James E. Don, dated July 1, 1985, a copy of which is attached hereto as Exhibit A.

2. Based upon my familiarity with the case as described in my affidavit filed with the court (Exhibit 2 to Petitioner's Objections to Magistrate's Report and Recommendation), I find the observations and conclusion reached by Dr. Masland totally unconvincing and well below the usual standards of medical thoroughness.

3. I see nothing in Dr.Masland's letter which causes me to detract or deviate in any degree from my observations and conclusions made in my earlier affidavit filed with this Court. I vigorously and strongly disagree with the statements and diagnosis reached by Dr. Masland for the reasons stated in my earlier affidavit, and in particular, on the following grounds:

a. An electroencephalogram ("EEG") is one of the most important diagnostic tools in detecting epilepsy. The only EEG performed on Robert Wayne Vickers to my knowl. ige was the one conducted on June 6, 1978. That EEG showed an abnormality. Even the Arizona State Hospital staff neurologist, Dr. Richard Thompson, concluded that the EEG was abnormal and consistent with epilepsy. Furthermore, I have obtained the actual tracings of the June 6, 1978 EEG and reviewed them with the assistance of a neurologist from Boston, Dr. Roy Freeman. Dr. Freeman and I concur that the EEG was abnormal and consistent with a diagnosis of epilepsy.

EXHIBIT I

b. The documented history of Mr. Vickers' treatment with Dilantin and phenobarbital prescribed by other physicians earlier in his life demonstrate that at least one or more physicians concluded that he suffered from epilepsy. Significantly, these conclusions were reached by physicians who treated Mr. Vickers before he entered the California Youth Authority and Arizona Department of Corrections, prior to the occurences of the offense charged in this case.

c. The strong possibility of an epileptic disorder is also suggested by the numerous accounts and descriptions of Mr. Vickers' bizzare and peculiar behavior, particularly at night. It is well established that one manifestation of epileptic disorders, particularly those involving the limbic system such as temporal lobe epilepsy, is nocturnal disturbance similar to the kind described of Mr. Vickers (e.g. vivid visual hallucinations, sleep talking or walking in adulthood, automatic behavior).

4. In view of the substantial clinical and historical data suggesting an epileptic disorder, Dr. Masland's conclusion that there is "absolutely nothing that suggests that this man is epileptic" and that further diagnostic testing would be "totally superfluous" is, in my professional opinion, entirely inconsistent with current medical and neurological understanding. Applying conservative standards of medical diagnosis, I do not believe that a reasonable and competent physicain familiar with epilepsy and it s manifestations could deny that there was at least a strong suspicion that Mr. Vickers suffers from epilepsy and that further tests are warranted.

5. The matters stated herein are of my own personal knowledge or are matters which are customarily reasonably relied upon by psychiatrists. I am qualified

to render the opinions contained herein, and if called to do so, I would and could testify as to the same.

Respectively submitted,

David M. Bear, M.D.

Sworn to me by David M. Bear, M.D., on this 24 day of July, 1985.

William E. Branson
Notary Public

My commission expires on 19 November 1987.

4629-006

DECLARATION OF PAUL M. BINDELGLAS, M.D.

I, Paul M. Bindelglas, M.D., hereby declare that:

Attached hereto as Exhibit A., is a true and correct copy of a letter I wrote to Edward M. Chen, Esq., Counsel for Robert Wayne Vickers in Vickers vs Ricketts, etal, CIV-83-2027-PHX-WPC.

The matters stated in my letter to Mr. Chen are of my own personal knowledge, or are matters which are customarily and reasonably relied upon by psychiatrists. I am qualified to render the opinions contained therein, and, if called to do so, I would and could testify as to the same.

I declare under penalty of perjury under the laws of the State of Arizona, that the foregoing is true and correct.

Executed this 25th date of July, 1985, in Phoenix, Arizona.

Paul M. Bindelglas, M.D.

EXHIBIT H

PAUL M. BINDELGLAS, M.D., LTD.
CAMELBACK PROFESSIONAL BLDG.
5081 NORTH 34TH ST.
PHOENIX, ARIZONA 85018
TEL. 956-2080

July 23, 1985

Coblentz, Cahen, McCabe & Breyer
Attorneys at Law
One Embarcadero Center
San Francisco, California 94111

Attention: Edward M. Chen

RE: ROBERT WAYNE VICKERS

Dear Mr. Chen:

The following are my comments on Dr. Willian Masland's letter of July 1, 1985.

1.) What medical records were reviewed?

a.) Did he see Dr. Enos's report that indicated both psychopathology and neurological deficits?

b.) Did he see reports of head injuries, and seizures from the California Youth Authority, and from his earlier history?

c.) Did he see and read the actual tracings of Mr. Vicker's EEG which showed a temporal lobe focus?

d.) Did he read my last psychiatric report to the Court?

2.) He discussed his behavior with the staff at the hospital.

Mr. Vickers was kept in 4-point restraints almost the entire time he was at the hospital, so what behavior could the staff observe? Part of the reason for a totally independent examination was the inadaquacy of the examination at the State Hospital where:

1. no psychological testing was done;
2. he was kept tied down(even though he had never been violent there), so no observation was possible;
3. even an inadaquate EEG there proved to be abnormal;
4. Their conclusion that no seizure disorder existed rested on a blatantly incorrect assumption that a negative CT scan ruled out a seizure disorder. No neurologist would make such a conclusion.

3.) Dr. Masland states"he interviewed Mr. Vickers."

1. How long was the interview?

2. Was it before or after his discussion with the staff at the State Hospital?

3. What kind of questions did he ask Mr. Vickers?

4. Did he ask about his headaches(which are amply documented in the medical records), or his black-outs for periods of time, his auditory, visual, olfactory(smell), and gustatory(taste) perceptual disturbances?

5. Did he ask about Deja Vu?

6. Did he ask about Mr. Vickers sudden changes of mood, and his periods of being somewhat remote in his relating to others in his presence?

7. Did he take a history which included noting his auto accidents.

8. Did he do any neurological examinations on Mr. Vickers?

4.)Dr. Masland stated he has been"under intense scrutiny, including that of trained medical personnel for a number of years."

Actually, Mr. Vickers lives in a cell by himself in which there are screens on the bars. Nobody sees him or talks to him. The food is shoved through the slot in the door and the empty tray is taken out after his meals. The medical personnel see him only when he goes on"sick call", and that is for a very brief, circumscribed length of time.

5.)"Historically, there is absolutely nothing to suggest his man is epileptic."

Although I would even disagree with that statement because of the history of head injuries and history of actual seizures at the California Youth Authority,(which I really doubt if Dr. Masland ever saw), nevertheless, the issue here is really not one of the usual "epilepsy, which is a"Grand Mal Convulsive Seizure", but rather, the Complex Partial Seizures which come usually from foci in the temporal

lobe and are usually non-convulsive. These are termed "Psychic Seizures" because of the abnormal behavioral and emotional features often associated with these cerebral discharges.

All of this raises the question as to what Dr. Masland was asked to evaluate, and who briefed him on what the neurological issues were that needed clarification.

It would appear that from this last sentence of Dr. Masland that stated he felt he was to ascertain if the man was "epileptic", (which usually means convulsive seizures), he is not dealing with the issue at hand at all. His very last sentence also would be seen to lend credence to the view that Dr. Masland was thinking in terms of convulsive seizures only. Thus, the statement, "the intensity of the observational data is so high that further diagnosic testing, such as EEG, would be totally superfluous." makes sense only if one were observing convulsive seizures.

If it were in reference to the Complex Partial Seizures from a temporal lobe focus, such a statement would be absurd, because the symptoms of a temporal lobe seizure disorder are behavioral and emotional, as I mentioned above, but need to be correlated with encephalographic and neuro-psychological data. Certainly Mr. Vickers has had bizarre episodic emotional and behavioral disturbances. Convulsive seizures, however, if they were present, would have been more likely to have been observed and identified because of their dramatic and characteristic symptomatology.

It is my feeling that Dr. Masland really did not address the issues that needed to be resolved at all, and if he feels they have been addressed, certainly gives no objective reasons of his own as to how he reached his conclusions.

Sincerely yours,

Paul M. Bindelglas, M.D.

PMB/nr

ORIGINAL

Supreme Court U.S.
FILED
JUL 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-~~7626~~ 7629

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

ROBERT WAYNE VICKERS,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General of
the State of Arizona

JESSICA GIFFORD FUNKHOUSER
Chief Counsel
Criminal Division

JACK ROBERTS
Assistant Attorney General
(Counsel of Record)
Department of Law
1275 W. Washington, 1st Floor
Phoenix, Arizona 85007
Telephone: (602)255-4686
(State Bar No. 005149)

Attorneys for RESPONDENTS

RECEIVED
JUL 24 1989
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED FOR REVIEW

1. Does a defendant who has been examined by ten to twenty doctors over a decade have a constitutional right to be sent out of state for 4-6 weeks testing by doctors of his choice to establish a physical condition which, even if definitively established, would be of minimal assistance to the jurors in evaluating his mental state at the time of the crime?

2. Is a defendant constitutionally entitled to have jurors decide the aggravating circumstances that may qualify him for the death penalty?

3. Does Arizona's death penalty statute violate the Eighth and Fourteenth Amendments by:

a) Requiring that death be imposed if the defendant fails to prove the existence of mitigating circumstances sufficiently substantial to call for leniency; and

b) not requiring the sentencer to consider as potential mitigation anything the defendant has not proven by a preponderance of the evidence?

4. Has Arizona achieved a constitutionally acceptable interpretation of the "especially heinous, cruel, or depraved" circumstance?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CASES AND AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	7
CONCLUSION	13
CERTIFICATION	14

TABLE OF CASES AND AUTHORITIES

Cases	Page
Ake v. Oklahoma 470 U.S. 68 105 S. Ct. 1087 84 L. Ed. 2d 53 (1985)	7,8,9,10,11
State v. Vickers 138 Ariz. 450 675 P.2d 710 (1983)	1
State v. Vickers 159 Ariz. 532 768 P.2d 1177 (1989)	11,12
Vickers v. Ricketts 798 F.2d 369 (9th Cir. 1986)	11

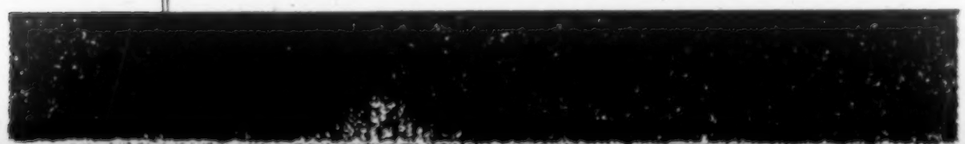
STATEMENT OF THE CASE

Originally, petitioner was indicted in March 1982 for the murder of William (Buster) Holsinger and arson of an occupied structure. He was convicted of those charges and received the death penalty for the murder. The Arizona Supreme Court reversed. State v. Vickers, 138 Ariz. 450, 675 P.2d 710 (1983). In October 1985, the state proceeded to trial upon the first-degree murder charge. The following evidence was adduced at trial.

The evening of March 4, 1982, John Marling was the pod officer in wing 1 of cellblock 6 at the state prison. Holsinger was housed in B-13, Luis Mata in B-14, petitioner in B-15, and Sylvester Smith in B-16. (R.T. of Oct. 17, 1985, at 98-99, 112-13.) Shortly after the evening meal, about 5:00 p.m., Marling let petitioner out of his cell to "porter," sweep and mop the pod and collect the trash. (Id. at 100-01.) When petitioner collected the trash, Marling opened the door to the pod to permit him to set it outside near a stairwell. Having closed that door, Marling picked up the trash and took it to wing 4 at the other end of the building. He was gone for 10 minutes and the door to petitioner's cell was open. (Id. at 95, 102, 108.) Alerted to a fire back in wing 1, Marling returned to discover black smoke filling the pod. Captain Herbert Padilla and Correctional Service Officer (CSO) Mitchell Vancura succeeded in getting petitioner out of the pod. Due to the smoke, they could not reach the three other inmates until the fire department brought airpacks. (Id. at 72-78, 83-84.) When Padilla and Vancura had taken petitioner down the stairs from the pod and into the hallway, Padilla asked what had happened because the officers did not know. Petitioner replied: "I burned Buster." Uncertain what he said, Padilla

asked him to repeat it, and petitioner did. (Id. at 80.) Padilla then asked, "Is he dead?" Petitioner said, "He should be, he's on fire." (Id. at 81.) Officer Vancura overheard these statements. Vancura also heard petitioner say that he "got the old man back" and "burnt him out." (Id. at 121.) With airpacks, Vancura and Padilla managed to drag out Sylvester Smith, who was convulsing in a state of semi-consciousness, and Luis Mata, whom they found unconscious, wedged between the toilet and rear wall of his cell. Padilla and Vancura retrieved the badly burned body of Buster Holsinger and evacuated 16 other inmates from that same wing. (Id. at 83-84, 122-26.)

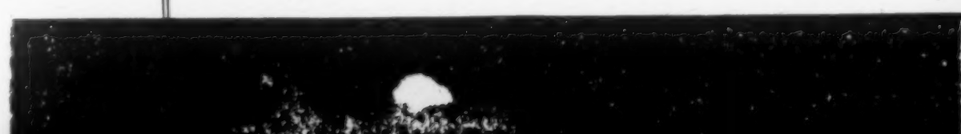
At least 1/2 hour later, in the squad room, Vancura saw petitioner again. Petitioner inquired whether anyone was dead. When Vancura answered that he did not know, petitioner said that he had "gotten the old man back." Petitioner had shown Holsinger a picture of his young niece and a crayon drawing from her. Upon looking at the picture -- according to petitioner -- Holsinger asked him if he "had ever ate his niece out." (R.T. of Oct. 17, 1985, at 126-28.) Later, when Detective Morgan arrived, Vancura heard petitioner repeat the same statements after Miranda warnings. (Id. at 130; R.T. of Oct. 22, 1985, at 80-84.) Petitioner told Morgan that he burned up Buster. He saved five bottles of Vitalis, poured it into a plastic ice cream container, put tissue paper in it, set it afire, and threw it through the bars at Holsinger. Petitioner said that Holsinger was standing near the door of his cell, ran around the cell after the flaming liquid hit him, then wrapped himself in a blanket. (Id. at 85-86.) He told Morgan that he had shown Holsinger a drawing from his niece and a picture of her. When Holsinger asked, "Did you ever eat her out?," petitioner decided to "burn Buster." (Id. at 86.) Petitioner also told Morgan that Holsinger, who was handicapped to a degree, had made a



"slave" of him and had him running errands. When petitioner learned that Holsinger was not quite so helpless as he thought, that angered him. (Id. at 101-02.) As petitioner was leaving the squad room, he asked Morgan whether he had done a good job (on Holsinger). Morgan asked what he thought. Petitioner said: "I think I did a damn good job." (Id. at 86.)

Michael Garten testified that he examined debris from Holsinger's cell, "ceiling slosh," and the ice cream container petitioner used to concoct his fire bomb. They contained ingredients indistinguishable from those used in Vitalis, or at a minimum, the same kind of alcohol residue found in Vitalis. (R.T. of Oct. 17, 1985, at 146-58.)

David Dale, Chief Fire Investigator, examined Holsinger's cell. He discovered a "V" slosh pattern on the ceiling of the cell; the walls displayed a clockwise sloshing pattern. The fire burned toward the front of the cell from the interior. Accelerant had been sloshed upon the locking mechanism of the pod door to render it inoperative. (R.T. of Oct. 22, 1985, at 11-24.) The "V" pattern on the ceiling indicated that the assailant reached through the food window -- about 20 inches wide and 3 feet from the floor -- and threw the flaming liquid upward in at least two separate motions. (Id. at 17.) Dale opined that the attacker made a minimum of three separate throws into the cell at different angles, but easily could have made six to nine throws. (Id. at 36.) Dale said that Holsinger was in the center of the fire, and was the target of the attack. (Id. at 33, 63.) Holsinger's burns, especially those of the face, were consistent with the kind made by liquid accelerant thrown directly upon a person. (Id. at 32-33, 58.) The severe burns beneath Holsinger's arms indicated that he raised his arms trying to smother the fire enveloping his face. (Id. at 33-35.)



By stipulation, the testimony of Dr. Thomas Jarvis from the 1982 trial was read into the record because he was out of the country. (Minute Entry of Oct. 17, 1985.) The autopsy revealed second and third-degree burns on Holsinger's face and arms, and on the side of his body. He died from aspirating hot gases and smoke. (R.T. of Sept. 28, 1982, at 135-39.) Jarvis received a letter from petitioner at his home September 6, 1982. He turned it over to the Pinal County Attorney. (Id. at 140-41.) William J. Flynn, questioned documents examiner, studied the letter and compared it to exemplars taken from petitioner. (Exhibits 26 and 31.) Noting the uniqueness of petitioner's ornate style, he concluded that petitioner wrote the letter to Jarvis. (R.T. of Oct. 22, 1985, at 70-74.) Flynn also testified that petitioner tried to disguise his writing style in the exemplars. (Id. at 75.) The letter to Jarvis said:

> Just answer one question doc. Did he look & smell like a burnt piece of toast? The way you did this medical report on buster -- looks like you had just as much fun as I did!
>
> Bonzai Bob
> [Petitioner's nickname]

(Exhibit 31.)

Dr. Paul Bindelglas, the defense expert, believed that there was a definite probability that petitioner had temporal lobe epilepsy, but that more testing was necessary. (R.T. of Oct. 22, 1985, at 120-29.) He could make only an educated guess about petitioner's state of mind when he murdered Holsinger, and, in fact, never gave an opinion about petitioners' sanity at the time of the murder. (R.T. of Oct. 23, 1985, at 8-10.) On cross-examination, Bindelglas admitted that petitioner displayed numerous traits characteristic of an antisocial personality. (Id. at 15-22.)

In rebuttal, the prosecutor called Drs. Masland, Tuchler, and LaWall. A neurologist with a subspecialization in epilepsy, Masland interviewed petitioner at prison June 24, 1985. He reviewed medical records at the prison and an EEG from 1978. He read the reports of Bindelglas and Tuchler, and a statement by a Dr. Bear from Boston. Masland examined petitioner looking specifically for indications of temporal lobe epilepsy -- and found none. He considered the 1978 EEG normal. (R.T. of Oct. 23, 1985, at 76-82.) Masland told the jurors that pattern-directed aggression or highly coordinated behavior during an epileptic seizure was extremely rare. (Id. at 84-85.) Masland concluded that, within all reasonable medical probability, petitioner's behavior when he ignited Holsinger did not result from temporal lobe epilepsy. Petitioner was competent and rational when Masland examined him and when he murdered Holsinger. (Id. at 102-06.)

Dr. Maier Tuchler, a neuropsychiatrist board certified in neurology, psychiatry, and forensic psychiatry, saw petitioner at least six times between 1978 and 1985. After the first examination in 1978, he diagnosed petitioner as antisocial personality. (R.T. of Oct. 24, 1985, at 3-9.) Tuchler saw petitioner two more times in 1978. On those occasions he was looking for signs of temporal lobe epilepsy, but found none. (Id. at 11.) Neither did Tuchler detect signs of mental illness or hallucinations. In 1979 Tuchler examined petitioner again. Again, he diagnosed him as antisocial personality; he saw no evidence of neurological defects and no need for more electrical studies. (Id. at 15.) Tuchler saw petitioner in July 1982, after he murdered Holsinger. Petitioner told him that he wished to be his own attorney, and his strategy

was to make the state spend a lot of money. (Id. at 16-17.) In January 1985, Tuchler examined petitioner, looking specifically for indications of temporal lobe epilepsy or a similar condition. (Id. at 18.) Conceding that additional tests could be performed to confirm or rule out temporal lobe epilepsy, Tuchler stated that, in his review of over a decade of petitioner's medical history, he had seen no indication of a temporal lobe disorder that could explain every act of violence. (Id. at 21-22.) Tuchler said one could not explain every act of violence, from the age of 10, as the product of an alleged temporal lobe seizure. (Id. at 24.) The decision that led to Holsinger's murder may have been impulsive, but the acts were planned; and even if petitioner had temporal lobe epilepsy, that could not have been responsible for the volitional and complex nature of the acts involved in the murder of Holsinger. It was Tuchler's opinion that petitioner was legally sane when he killed. (Id. at 26.)

Dr. John LaWall, board certified in psychiatry and forensic psychiatry, and board eligible in neurology, examined petitioner in 1982. Petitioner told him that in the past he claimed hallucinations to fake mental illness; his "suicide attempts" (only superficial wounds) were designed to get him to a hospital to increase his chances to escape. (R.T. of Oct. 24, 1985, at 64-70.) LaWall diagnosed petitioner as antisocial personality free of mental illness and legally sane at the time of the murder. (Id. at 70-72.)

REASONS FOR DENYING THE WRIT

I

PETITIONER WAS NOT DEPRIVED OF A FAIR TRIAL NOR OF THE BASIC TOOLS WITH WHICH TO BUILD HIS DEFENSE.

a.

Failure to make a threshold showing

Part of this Court's holding in Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985) was the following:

> We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one.

470 U.S. at 74, 105 S. Ct. at 1091-92. Unfortunately, as Chief Justice Reinquist noted in his dissent, this Court did not at that time define what was necessary to make "a preliminary showing." 470 U.S. at 90, 105 S. Ct. at 1099. It should be apparent from the statement of facts in this case that there was absolutely nothing in any of petitioner's actions or statements that called into question his sanity at the time of the murder. Respondent does not believe that this Court's requirement of "a preliminary showing" meant that if a defendant simply had no other defense, and had to rely upon insanity, that he had made a preliminary showing. If that is the case, then every defendant who has no other defense, will always satisfy this threshold showing. Petitioner does not point to one action or statement surrounding the commission of the offense, or his statements made voluntarily after the offense, that would call into question his sanity at the time of the murder. Instead he relies upon past medical history and examinations, most of which diagnosed him as

antisocial personality, but a few of which concluded that he might have temporal lobe epilepsy, a physical condition, not a mental illness. Thus, petitioner has merely assumed that he satisfied the threshold showing required in Ake. When a petitioner can point to nothing in the facts, nothing in his actions or statements after the offense, that calls his sanity into question, respondent respectfully contends that reliance upon past medical history is insufficient to make a threshold showing that his sanity in this case can reasonably be called into question. In other words, if the mere assertion of insanity as a defense, with nothing in the actions or words of the defendant to suggest that, will satisfy the threshold showing spoken of in Ake, then in reality there is no threshold showing necessary. Both petitioner's words and his actions to police, and even to Dr. Jarvis some months later in the letter he sent Jarvis, indicate that he knew exactly what he was doing, intended to do it, concocted the firebomb with materials he had saved, and ignited Buster Holsinger in his cell. To say that any of those statements or actions suggests insanity is ludicrous. Therefore, respondent respectfully maintains that if this Court's requirement of a threshold showing in Ake is to have any substance, it must mean more than mere desperate reliance upon insanity when there is no other defense.

b.

Petitioner was not deprived of a fair trial nor of the basic tools with which to build an adequate defense.

Petitioner claims a denial of due process because the trial court did not allow him to arrange the tests he says would have provided a definitive answer about temporal lobe

epilepsy. No due process violation occurred because: (1) petitioner reads Ake far too broadly; (2) he has been examined by numerous doctors over a period of years; (3) defense counsel, through Dr. Bindelglas, presented everything pertinent to temporal lobe epilepsy; (4) the Constitution does not require that an extremely dangerous man be transported to another state for a 4 to 6-week stay to be observed by doctors of his choice; (5) even if a definitive diagnosis of temporal lobe epilepsy had been established, nobody could have determined whether petitioner was influenced by it when he killed Holsinger.

Ake v. Oklahoma can by no means be stretched to apply to petitioner. No psychiatrist examined Ake about his mental state at the time of the crimes -- only his competency to stand trial. Oklahoma refused to provide Ake any examination at state expense about his mental condition at the time of the offense. At trial there was no expert testimony for either side about Ake's mental state. Under those circumstances this Court described Oklahoma's obligation:

> This is especially so when the obligation of the State is limited to provision of one competent psychiatrist, as it is in many States, and as we limit the right we recognize today. . . .

470 U.S. at 78-79, 105 S. Ct. at 1094. (Emphasis added.) Ake did not give defense counsel carte blanche to name the doctors, tests, and location acceptable to counsel. In this case, Drs. Bindelglas, Bear, Bendheim, Tuchler, Masland, Baker, Gold, and LaWall examined petitioner before his first trial or the retrial. Drs. Bear, Tuchler, LaWall, and Masland are specialists in neurology. Through Dr. Bindelglas, petitioner was able to present a medical basis for the defense of temporal lobe epilepsy.

Bindelglas testified at length about the symptoms of that condition and how, in his opinion, it could render one legally insane. (R.T. of Oct. 22, 1985, at 119-67.) In addition, he referred to Drs. Enos, Bear, Schomer, Mark, Nelson, and Santiago, who had examined petitioner's medical records. (Id. at 153-56.)

This Court in Ake was concerned that the defendant have the basic tools to mount an adequate defense. Petitioner's argument, however, goes far beyond the scope of Ake: the state must arrange to have him transported to an out-of-state facility (either California or Massachusetts) for 4 to 6 weeks of observation and pay for tests to be performed by doctors of his choosing. Dr. Bindelglas admitted that, even if petitioner had temporal lobe epilepsy, that was not ipso facto grounds for concluding he was insane at the moment of the murder, and even after the tests, nobody could say if he was legally insane at the time he killed Holsinger. (Id. R.T. of Apr. 2, 1985, at 41, 64-65.)

The trial court denied the motion for out-of-state testing, but appointed Dr. William Masland, a neurologist, to examine petitioner to see if further tests were necessary. (Minute Entry of May 22 and June 13, 1985.) The trial court said that, if Masland believed further tests were necessary, additional arrangements would be made. (Minute Entry, June 18, 1985.) Masland concluded that further testing was not necessary because of the intensity of the observational data. (Instruments, at 355.)

Even if petitioner had satisfied the threshold test -- and respondent submits that he did not -- this Court utilized a tripartite test to see whether access to a competent psychiatrist was warranted: (1) the private

interests affected by the action of the state; (2) the governmental interests affected if the safeguard is provided; (3) the probable value of the additional procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interests if those safeguards are not provided. 470 U.S. at 77, 105 S. Ct. at 1093.

Respondent concedes that petitioner could satisfy the first part of the test, but he does not satisfy either of the two remaining parts. Petitioner could have been tested at the Arizona State Hospital, but Dr. Bindelglas did not want that. Instead, Bindelglas wanted to send petitioner out of state, to either Massachusetts or California, for 4-6 weeks of testing at the expense of Arizona. This was petitioner's second murder -- in 1978 he murdered his cellmate Frank Ponciano, but received a new trial from the Ninth Circuit. Vickers v. Ricketts, 798 F.2d 369 (9th Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 928 (1987). Respondent respectfully maintains that, under these circumstances, the Constitution did not require that this dangerous double murderer be sent out of state for this prolonged testing. The Arizona Supreme Court recognized the expense and the burdensome security problem that would have entailed. State v. Vickers, 159 Ariz. 532, 537, 768 P.2d 1177, 1182 (1989).

Finally, and most important, is that any alleged psychiatric assistance derived from this out-of-state testing would have been of minimal assistance to the jurors in deciding the issue of sanity. Even if such testing had shown, at least in the opinion of those conducting the tests, that petitioner had temporal lobe epilepsy, none of them could have testified with a reasonable degree of

medical certainty: (1) that petitioner suffered a seizure at the time of the offense; or (2) if he suffered a seizure, that it in fact rendered him legally insane. The most any expert could have said would have been if petitioner suffered a seizure, it might have rendered him legally insane. When balanced against the three expert witnesses called by the state, who all testified that petitioner was not suffering a seizure at the time of the murder and was legally sane, such testimony would have been of minimal assistance to the jurors. The Arizona Supreme Court also recognized that. 159 Ariz. at 537, 768 P.2d at 1182.

Petitioner had the benefit of numerous examinations by many doctors over the years and immediately before trial in this matter. He had the tools for his defense and presented it through Dr. Bindelglas. Due process did not demand that the trial court permit this dangerous man to be taken out of state for 4-6 weeks of expensive testing that, even if favorable, would have been of minimal assistance in determining his sanity.

II, III, IV

Respondent heartily concurs that this Court ought to grant certiorari on these issues, as respondent has urged in the petition now pending before the Court in Ricketts v. Adamson, No. 88-1553 (filed Mar. 20, 1989). This Court should grant certiorari to affirm the Arizona Supreme Court and to reverse the gross distortion of law by the Ninth Circuit in its decision.

CONCLUSION

Respondent agrees that this Court should review questions II, III, and IV, but not the first issue presented by petitioner. Petitioner never made a threshold showing that any of his actions or statements at the time of the offense, or after it, indicated that his sanity was in question. Moreover, he is merely arguing that Arizona should have had to pay the expense of testing him for 4-6 weeks in another state so that he could try to obtain other opinions to bolster Dr. Bindelglas' opinion. In view of the burdensome security problem that petitioner would have presented, the expense of such prolonged testing, and the minimal value of such testing to the jurors, there was no deprivation of due process and this Court should deny certiorari on that issue.

DATED this 18th day of July, 1989.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

JACK ROBERTS
Counsel of Record
Assistant Attorney General

Attorneys for RESPONDENT

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

JACK ROBERTS, being first duly sworn upon oath, deposes and says:

That he served the attorney for the petitioner in the foregoing case by forwarding three (3) copies of RESPONSE TO PETITION FOR WRIT OF CERTIORARI, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

DENISE I. YOUNG
Arizona Capital Representation Project
Arizona State University
College of Law
Tempe, Arizona 85287-8185

this 18th day of July, 1988.

Jack Roberts
JACK ROBERTS

SUBSCRIBED AND SWORN to before me this 18th day of July, 1989.

Ethel M. Arment
NOTARY PUBLIC

My Commission Expires:

My Commission Expires Dec. 15, 1992

CR40-009
0241D/emm (M)

SUPREME COURT OF THE UNITED STATES

ROBERT WAYNE VICKERS *v.* ARIZONA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

No. 88-7629. Decided June 28, 1990

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate the death penalty in this case. Even if I did not hold this view, I would grant the petition to decide whether the Constitution requires a State to provide an indigent defendant access to diagnostic testing necessary to prepare an effective defense based on his mental condition, when the defendant demonstrates that his sanity at the time of the offense will be a significant issue at trial. I believe that our decision in *Ake* v. *Oklahoma*, 470 U. S. 68 (1985), compels us to answer that question in the affirmative.

Petitioner Robert Wayne Vickers was convicted of murdering a prison inmate and sentenced to death. His only defense at trial was insanity. Specifically, Vickers claimed that he suffered from temporal lobe epilepsy, a brain disorder that can cause violent behavior and render a person unable to appreciate the nature and wrongfulness of his acts. Vickers' court-appointed psychiatrist, Dr. Paul Bindelglas, determined, after a lengthy interview and an exhaustive review of Vickers' medical records, that Vickers suffered from "definite dissociative reactions" possibly due to temporal lobe epilepsy. Dr. Bindelglas based his opinion on Vickers' his-

tory of cerebral trauma and seizures, neurological deficits reported by a psychologist when Vickers was a child, improvement in Vickers' condition when he was placed on anticonvulsive and psychotropic medications and reversion when he was taken off the medication, and an abnormal electroencephalogram (EEG) performed four years before the murder. Dr. Bindelglas further opined that Vickers probably was in a dissociative state at the time of the offense, which made him "incapable of rendering any judgement and . . . unable to know right from wrong." Dr. Bindelglas stated that he could not make a definitive diagnosis, however, without certain neuropsychological testing.

Based on Dr. Bindelglas' recommendation, petitioner requested that the trial court provide access to diagnostic testing. Petitioner included with his request an affidavit from a second psychiatrist, Dr. David Bear, who, after reviewing petitioner's records and examining him for five hours, agreed that there was a "substantial possibility" that Vickers suffered from temporal lobe epilepsy, which may have impaired his ability to "appreciate the quality and nature of the act and its wrongfulness." Dr. Bear also stated that diagnostic testing, including a careful neurological examination and multiple EEGs, was necessary "before professional judgment can be rendered regarding Mr. Vickers' mental state at the time of the subject offense." In addition, the state's own expert, Dr. Maier Tuchler, testified at petitioner's competency hearing that diagnostic testing was necessary to determine definitely whether Vickers suffered from temporal lobe epilepsy. Finally, petitioner supplied the court with the affidavits of two other psychiatrists who testified that strong evidence indicated that Vickers suffered from a mental disorder which impaired his capacity to make rational judgments, but that diagnostic testing was necessary before a firm conclusion could be reached.

Despite the consensus of these medical experts that diagnostic testing was necessary, the court denied petitioner's

request. The court relied on a two-paragraph letter from a psychiatrist appointed at the state's request, Dr. William Masland. Dr. Masland concluded, on the basis of a quick review of petitioner's medical records, conversations with prisoners and prison staff, and a brief interview with Vickers, that "there is absolutely nothing to suggest that this man is epileptic" and that "further diagnostic testing . . . would be totally superfluous." The court refused to reconsider its order after receiving additional affidavits from Dr. Bindelglas and Dr. Bear and two neurologists that vehemently contested Dr. Masland's opinion and reemphasized the need for diagnostic testing.

Because of the lack of diagnostic testing, Dr. Bindelglas could testify at trial only that there was a "definite probability" of temporal lobe epilepsy. Before sentencing, petitioner again requested diagnostic testing to establish the brain disorder as a mitigating circumstance; again the court denied his motion.

The Arizona Supreme Court rejected petitioner's argument that the State violated due process by denying him an adequate opportunity to prove his insanity defense. The court reasoned that the requested testing would have been expensive and would have posed a "burdensome security problem." The court also claimed that nothing indicated that testing would have helped petitioner prove his insanity defense.

In *Ake* v. *Oklahoma*, *supra*, at 83, this Court held that when an indigent "defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a *competent* psychiatrist who will conduct an *appropriate* examination and assist in evaluation, preparation, and presentation of the defense." (Emphases added.) The right to a competent psychiatrist necessarily includes the right to have the State provide the psychiatrist with the tools he requires to conduct an adequate examination and evalua-

tion of the defendant. To hold otherwise is analogous to requiring the State to provide an indigent defendant with an attorney, but not requiring it to pay for the attorney's legal research expenses.

This is not to say that an indigent defendant is entitled to every scientific procedure that has only a remote possibility of bolstering his defense. Thus, we recognized in *Ake* that "the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy." *Id.*, at 77 (citing *Ross* v. *Moffitt*, 417 U. S. 600 (1974)). But when a defendant demonstrates that his sanity will be a significant issue at trial, and his psychiatrist makes a plausible showing that certain testing is necessary for him to perform his *Ake* function, that testing must be considered one of "the raw materials integral to the building of an effective defense" that the State must provide. *Ibid.*

Petitioner undoubtedly satisfied the threshold requirements. First, his sanity was a significant factor in his defense. Vickers' "sole defense was that of insanity," *id.*, at 86, and six experts testified that there was a substantial possibility that Vickers suffered from a mental disorder at the time of the offense that might have impaired his capacity to understand the nature of his actions. Indeed, the trial court's appointment of Dr. Bindelglas itself shows that petitioner's sanity was a significant issue. Second, Vickers' court-appointed psychiatrist established that testing was necessary for him to perform his *Ake* role adequately. Dr. Bindelglas stated in the clearest terms that he could not make a definitive diagnosis without specific testing. Six other medical experts, including the State's expert, Dr. Tuchler, affirmed the need for testing. Without such testing, Dr. Bindelglas could offer only a tentative opinion at trial. Clearly, then, Dr. Bindelglas' ability to contribute to petitioner's defense was impaired unreasonably by the State's refusal to provide access to diagnostic testing.

The trial court's reliance on Dr. Masland's opinion that testing would be superfluous—an opinion not shared by *any* of the other doctors—does not justify its denial of access to testing. *Ake* requires the appointment of a psychiatrist who will assist in the preparation of the defense, not one who will merely give an independent assessment to the judge or jury. *Id.*, at 83. Although a judge or jury may choose to believe the State's experts rather than the defendant's at trial, a court may not permit the State's experts to determine what resources the defendant's experts may use. To allow such a veto power is akin to permitting a prosecutor to decide on what cases defense counsel may rely or what witnesses he may call. As long as the defendant makes the threshold showing of the need for testing, the court must provide access to it.

The Arizona Supreme Court affirmed the trial court's decision in part on the assumption that the necessary testing would have to be performed out-of-state and would last four to six weeks, thus imposing substantial costs on the State and creating a security problem. The court based this assumption on Dr. Bindelglas' request that Vickers be tested in a California hospital "if at all possible" because the Arizona State Hospital might have been prejudiced in favor of its previous diagnosis and might not perform the job adequately. The trial court, however, never sought a compromise; it refused to provide for testing altogether. Any problem posed by sending Vickers to California is a red herring, then, to the extent that less burdensome testing would have satisfied the State's obligation. If, however, the testing procedure suggested by Dr. Bindelglas was in fact the only adequate means of arriving at a medically sound diagnosis, the burden on the State does not justify denying that testing. As we held in *Ake*, the State's interest in preserving its fisc is not substantial when compared with the compelling interest of both the defendant and the State in the fair and accurate adjudication

of a criminal case, particularly one in which the defendant's life is at stake. 470 U. S., at 78–79.

Finally, the Arizona high court maintained that further testing was of "questionable value" to petitioner's insanity defense and that the risk of an erroneous judgment was minimal because three state experts testified that Vickers was not insane at the time of the offense. This reasoning wrongly subjects *Ake* claims to harmless error analysis. In *Ake*, we did not endeavor to determine whether the petitioner's case had been prejudiced by the lack of a psychiatrist. Rather, we determined that, in general, psychiatric assistance is of extreme importance in cases involving an insanity defense, *id.*, at 79–82, and that without that assistance "the risk of an inaccurate resolution of sanity issues is extremely high," *id.*, at 82. Because the petitioner had made the threshold showing that his sanity was a significant issue at trial and the State had failed to offer psychiatric assistance, we reversed and remanded for a new trial. In this case, then, the trial testimony of the state's experts is irrelevant. Vickers' sanity was a significant issue at trial and testing was necessary for his psychiatrist to perform his *Ake* function. Because the trial court nevertheless refused to require the State to provide access to the requisite testing, Vickers is entitled to a new trial.

Our decision in *Ake* v. *Oklahoma* recognized the right of an indigent defendant to a competent court-appointed psychiatrist when his sanity is seriously in question. To deprive a defendant of diagnostic testing necessary for the psychiatrist to perform adequately his *Ake* function renders that right meaningless. I therefore dissent from the denial of certiorari.